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THE
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1873, 1875, & 1877.

AND
THE APPELLATE JURISDICTION ACT,
1876.

SEPTIMATE COURT OF JERUSALEM

1888, 1889, 1890, 1891, 1892

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BRADBURY, AGNEW, & CO., PRINTERS, WHITEFRIARS.

PREFACE TO SECOND EDITION.

IN the two years' interval that has elapsed since the publication of the first edition of this work, fresh legislation and additional rules and orders have made it necessary that a new edition should be prepared, more especially as the practical working of the new system has produced an immense number of decisions which have to a large extent settled the practice and made certain and definite that which before was but conjectural.

The Editors have spared no pains to make this edition one of the greatest practical utility and a sure guide to the existing procedure. With that object *every reported decision* involving points of practice upon the Judicature Acts has been embodied, and references given to all the authorities where the cases have been reported: the Judicature Act, 1877; the Appellate Jurisdiction Act, 1876; and all the rules and orders issued during the past two years have also been added; and, further, a Time Table, which gives a synoptical reference to the times within which it is provided all matters should be done, where any such provision is made. Also very numerous cross references have been inserted throughout the work, which cannot fail to be of use to the practitioner. Lastly, the copious Index has been carefully revised and many of the headings subdivided, so that

the complete analysis thus given may facilitate reference to every subject contained in the book.

In a work of so complex a character, the Editors cannot expect that the result of their efforts will be found absolutely perfect ; but they trust the labour bestowed upon this edition will have fulfilled their aim to make it welcome to the profession as a most practical and useful exposition of the working of the Supreme Court of Judicature Acts and Orders.

W. DOWNES GRIFFITH,

LINCOLN'S INN.

R. LOVELAND LOVELAND,

TEMPLE.

November, 1877.

PREFACE TO FIRST EDITION.

ON my return to practice at the English bar, in November, 1873, after an absence of nearly eight years—having been appointed in December, 1865, as Attorney-General at the Cape of Good Hope—I sought for some occupation by which I could usefully occupy my time and attention while waiting for the slow and painful accretion anew of the practice which had been so entirely dissipated by my long absence. As at that time the Supreme Court of Judicature Act of 1873 had just been passed, it offered an immediate subject such as I had been seeking for. I proceeded to study the Act closely, and soon found that there was no room, or very little, for originality in a work on the subject which should be useful to the body of practising lawyers, but that any book of such a character must, to be of value, sink the original and endeavour to give, as concisely as might conveniently be, but at the same time as fully as it be useful, all the law as at present settled on those parts of the new practice of which there are many identical with or very closely modelled upon the practice of former times, and, what was perhaps more essential but at least equally important, should specially note those points where, having up to the point pursued a similar course to that of the old practice, the new should suddenly diverge from it, though often only in a slight degree.

To effect this, it was of course necessary largely to have recourse to the works which have been already published, and have established their character, and I have, in this

respect, drawn, I am free to confess, very considerably from the third edition of "Lush's Practice," edited by Mr. Dixon, and from the fourth edition of Mr. Morgan's "Chancery Acts and Orders," besides having often had recourse to the last edition of "Daniel's Chancery Practice," and occasionally to White and Tudor's "Leading Cases in Equity," as well as to the reported cases decided since the publication of these works. With this assistance, I trust I have collected nearly all the practice which can be of assistance in throwing light on what is to be the reading of the new law, and for what remains untouched by it, the old books will still be as useful as ever.

I have given great pains to the index of the book, which, to any work of the kind, is perhaps as important as the book itself, and by every means of cross-reference, have endeavoured to make it as great an assistance to the practitioner as it can be made, and if I have at all succeeded in doing what I intended, I have no doubt of receiving, inwardly at least, some thanks and good wishes from my fellows at the bar.

I trust they may be satisfied with what I have done, which would have been better had I been able to make it so, and with all deference to their better judgments upon its merits, I submit my labours.

WILLIAM DOWNES GRIFFITH.

6, OLD BUILDINGS, LINCOLN'S INN,

October, 1875.

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ADDENDA.



- Page 16, last line, An appeal will not lie from a refusal by the Judge of the Admiralty Division to allow, under 31 & 32 Vict. c. 71, s. 27, an appeal from a County Court judgment to be prosecuted. *The Amstel*, 2 P. D. 186, 37 L. T. N. S. 138.
- „ 27, note *f*, *Harris v. Gamble* is now also reported in 46 L. J. Ch. D. 768.
- „ 31, 1st line from top, *Re The South of France Pottery Works Syndicate*, is now also reported in 37 L. T. N. S. 260.
- „ 61, note *a*, *Pacey & Wife v. London Tramway Co.* is now also reported in 46 L. J. Ex. D. (App.) 698.
- „ 224, note *e*, }
 „ 294, note *b*, } *Duckett v. Gover* is now also reported in 6 Ch. D. 82.
- „ 225, note *g* }
 „ 247, note *d* } *Horwell v. London General Omnibus Company* is now also
 „ 248, note *c* } reported in 46 L. J. Ex. D. (App.) 700.
- „ 243, note *b* *Kino v. Rudkin* is now also reported in 6 Ch. D. 160.
- „ 257, note *a* }
 „ 260, note *b* }
 „ 276, note *c* } *Harris v. Gamble* is now also reported in 46 L. J. Ch. D. 768.
 „ 278, note *d* }
 „ 286, note *b* }
- „ 286, line 14 from top, *Bagot v. Easton* is now also reported in 37 L. T. N. S. 266.
- „ 287, line 13 }
 from top } *Durling v. Lawrence* is now also reported in 46 L. J. Ch. D.
 „ 295, note *d* } 808.
- „ 303, O. XXX., r. 1, In an action for a nuisance, a plea of payment into Court, together with a denial of rights of action, ought not to be allowed. *Spurr v. Hall*, 46 L. J. Q. B. D. 693.
- „ 344, note *a* *Friend v. London, Chatham, and Dover Railway Co.* is now also reported in 46 L. J. Ex. D. (App.) 696.
- „ 364, note *e* }
 „ 367, note *f* } *Wood & Ivery v. Hamblet* is now also reported in 6 Ch. D.
 „ 378, note *b* } 113.

Page 381, O. XXXVII., r. 1, At the trial of a cause with *vivâ voce* evidence the Court admitted in evidence an affidavit filed upon an interlocutory motion, which had been ordered to stand over to the hearing, although the deponent was since deceased, and had not been cross-examined. *Elias v. Griffith*, 46 L. J. Ch. D. 806.

„ 381, note *h*, In *Re Western of Canada Oil, Lands, and Works Co.* is now also reported in 6 Ch. D. 109.

„ 457, line 5 from top, *Ex parte Reddish* is now also reported in 37 L. T. N. S. 237.

SUPREME COURT OF JUDICATURE ACT, 1873.

36 & 37 VICIT. CAP. 66.

An Act for the constitution of a Supreme Court, and for other purposes relating to the better Administration of Justice in England; and to authorise the transfer to the Appellate Division of such Supreme Court of the Jurisdiction of the Judicial Committee of Her Majesty's Privy Council.

36 & 37 VIC
c. 66.

[5th August, 1873.]

WHEREAS it is expedient to constitute a Supreme Court and to make provision for the better administration of justice in England :

And whereas it is also expedient to alter and amend the law relating to the judicial Committee of Her Majesty's Privy Council :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

1. This Act may be cited for all purposes as the "Supreme Court of Judicature Act, 1873."

2. This Act, except any provision thereof which is declared to take effect on the passing of this Act, shall commence and come into operation on the second day of November 1874.

§§ 1, 2.

Short title.
Commence-
ment of Act.
*Repealed 37 &
38 Viet. c. 83,
s. 1.*

36 & 37 VIC.
c. 66.

§ 3.

PART I.

Constitution and Judges of Supreme Court.

Union of exist-
ing Courts into
one Supreme
Court.

Partly repealed
38 & 39 Vict. c.
77, ss. 9 & 33,
and Sched. 2.

3. From and after the time appointed for the commencement of this Act, the several Courts herein-after mentioned, (that is to say,) the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.

County Pala-
tine Courts of
Equity not
affected.

County Courts
scarcely dealt
with.

As to Court of
Bankruptcy.

Change less
than at first
sight seems
made.

Nothing in the Act contained seems in anywise to affect the original jurisdiction of the county palatine courts of equity, though there are some sections hereafter to be mentioned, viz. 16, 34, 78, 99, and O. I. r. 1, which make some provisions directly or indirectly as to the Courts of Common Law of the counties palatine of Lancaster and Durham. As to the appellate jurisdiction from the county palatine of Lancaster in equity, see s. 18. The inferior courts, *e.g.*, the County Courts and others, whose jurisdiction is limited in degree or amount, are untouched save by a few sections comprised in Part 6 of the Act, by which certain changes are made as to the mode in which the law is to be administered, or rather as to the law which is in future to be administered in them. There was by the original form of the Act of 1873 a strong probability that a difficulty as to the administration of Bankruptcy in future would arise, as the enactments for the disposal of this part of the judicial work of the country were very meagre and not plainly directory, *e.g.*, the general jurisdiction of the London Court of Bankruptcy, which by the interpretation clause, s. 100, includes the Chief Judge in Bankruptcy, was by s. 24 transferred to the Exchequer division, but nothing was said as to how the jurisdiction then exercised by a single judge was henceforth to be administered by the division in question. This difficulty is happily removed by the repeal of this part of the Act of 1873 by s. 9 of the Act of 1875. The change made by the 3rd s., now under comment, seems at first sight very large, as if all the judicial system of the country were to be consolidated into one Court with, as might be supposed, one practice and one procedure, which, though in the eyes of some it would seem very desirable, and though in some respects it would appear to every one to be advantageous, would we think be pregnant with much more mischief than benefit; but when closely examined we shall find that nothing in reality is done at which any such alarm need be felt; we find that the old Courts in fact exist as they did formerly, though their names are changed, and that though, in some respects, chiefly formal, their practice has been varied and assimilated, still that in the main the practice itself, though in all somewhat altered, remains very like what it has been, and certainly in equity, administration

is not the same as the administration of common law ; or rather, perhaps, the distinction in propriety ceases to be that between equity and common law and becomes more naturally the distinction between procedure for administration and account, and procedure for the decision of conflicts between adverse litigants, the latter, being chiefly entertained by those divisions of the new Court which represent the old Courts of Common Law, and the former, by the Chancery division. This, however, being the leading distinction which continues to exist, the machinery of each division is still maintained as the machinery of the Courts heretofore existing ; and it is manifestly absurd to suppose that Courts are really the same, or very similar, in their procedure, whose machinery is so distinct as those of the Courts of Law and Courts of Equity. Under these circumstances we cannot help feeling it would have been a mistake that the Bankruptcy procedure, which is emphatically a procedure for administration, should have been given to the Exchequer division and not to the Chancery division ; and we think the change made by the Act of 1875 is in this respect beneficial. In fact the Lords had originally determined to give this jurisdiction to the Chancery division, and had with this view added to the division, another Judge, but the Commons in a fit of economy changed the arrangement, saved the extra Judge, and introduced the anomaly which found its place in the Act of 1873 as passed, which has only been in part remedied by the Act of 1875. The distinction of the Courts heretofore in existence, notwithstanding all the apparent consolidation and assimilation introduced, is in reality preserved, even in matters where there does not seem to be any very strong reason for its preservation, as will be seen in s. 34, where all the old exclusive jurisdictions of each of the Courts which, though founded in the history of the Courts to which such jurisdiction was attached, and so, interesting as matters of archæology, so to speak, had in many cases lost all further reason for existence, have in each case been specially preserved by the statute to the separate divisions of the Court.

36 & 37 VIC.
c. 66.

§§ 4, 5.

4. The said Supreme Court shall consist of two permanent Divisions, one of which, under the name of "Her Majesty's High Court of Justice," shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is herein-after mentioned, and the other of which, under the name of "Her Majesty's Court of Appeal," shall have and exercise appellate jurisdiction, with such original jurisdiction as herein-after mentioned as may be incident to the determination of any appeal.

Division of
Supreme Court
into a Court of
original and a
Court of appel-
late jurisdic-
tion.

With reference to the matter of this section, we may remark that some important amendments in the general law of new trials and appeals are established by the Rules of Court provided as a schedule to the Act of 1875, which will hereafter come under comment. See O. XXXIX. r. 3 and 4, and O. LVIII.

Rules as to
new trials and
appeals.

5. Her Majesty's High Court of Justice shall be constituted as follows :—The first Judges thereof shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the several Vice-Chan-

Constitution of
High Court of
Justice.

36 & 37 VIC.
c. 66.

§ 5.

cellors of the High Court of Chancery, the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the several Puisne Justices of the Courts of Queen's Bench and Common Pleas respectively, the several Junior Barons of the Court of Exchequer, and the Judge of the High Court of Admiralty, except such, if any, of the aforesaid Judges as shall be appointed ordinary Judges of the Court of Appeal.

Subject to the provisions herein-after contained, whenever the office of a Judge of the said High Court shall become vacant, a new Judge may be appointed thereto by Her Majesty, by Letters Patent. All persons to be hereafter appointed to fill the places of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively, shall continue to be appointed to the same respective offices, with the same precedence, and by the same respective titles, and in the same manner, respectively, as heretofore. Every Judge who shall be appointed to fill the place of any other Judge of the said High Court of Justice shall be styled in his appointment "Judge of Her Majesty's High Court of Justice," and shall be appointed in the same manner in which the Puisne Justices and Junior Barons of the Superior Courts of Common Law have been heretofore appointed: Provided always, that [*here follows a proviso since repealed by 38 & 39 Vict. c. 77, s. 3, which proceeds as in the note is set forth*].

All the Judges of the said Court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction; and shall be addressed in the manner which is now customary in addressing the Judges of the Superior Courts of Common Law.

The Lord Chief Justice of England for the time being shall be President of the said High Court of Justice in the absence of the Lord Chancellor.

Style of Judges,
40 Vict. c. 9,
ss. 4, 5.

The style of the Judges of the High Court and the Court of Appeal is provided or changed as may be thought the true view of the case by s. 4 of 40 Vict. c. 9, thus, "The ordinary Judges of the Court of Appeal shall be styled Lord Justices of Appeal, and the Judges of the High Court of Justice, other than the Presidents of Divisions, shall be styled Justices of the High Court." A Puisne Judge is also defined by s. 5 of the same Act. Section 3 of 38 & 39 Vict. c. 77, after reciting that by s. 5 of the principal Act, it is provided as follows (setting out the words of the proviso repealed), see *post*, proceeds: "And whereas, having regard to the state of business in the several Courts whose jurisdiction is transferred

“ by the principal Act to the High Court of Justice, it is expedient that
 “ the number of Judges thereof should not at present be reduced. Be
 “ it enacted that so much of the said section as is hereinbefore recited
 “ shall be repealed. The Lord Chancellor shall not be deemed to be a
 “ permanent Judge of that Court, and the provisions of the said section
 “ relating to the appointment and style of the Judges of the said High
 “ Court shall not apply to the Lord Chancellor.”

36 & 37 VIC.
 c. 66.

 § 6.

There is a strange omission in the above clause of the principal Act, considering what it contains. It enacts that the *first* Judges of the Court shall be the Lord Chancellor, the Lord Chief Justice, &c. ; it then goes on to provide that, subject to the provisions thereafter contained, whenever the office of a Judge of the said High Court shall become vacant, a new Judge may be appointed thereto by Her Majesty by letters patent. It then goes on to provide for future appointments to the offices of Lord Chief Justice, Master of the Rolls, Lord Chief Justice of the Common Pleas, and Lord Chief Baron, and preservation of the precedence and dignity of these offices, and then proceeds:—“ Every Judge who shall be
 “ appointed to fill the place of any other Judge of the said High Court of
 “ Justice shall be styled in his appointment Judge of Her Majesty’s High
 “ Court of Justice, and shall be appointed in the same manner in which
 “ the puisne Judges and junior Barons of the Superior Courts of Common
 “ Law have been heretofore appointed.” No word is inserted as to the appointment of the Lord Chancellor, and he is not named as a Judge of the Court, except as one of the first Judges of it. It is not intended that he should come within the clause providing for the appointment of any Judge other than the four excepted ones, and this is actually declared in s. 3 of the Act of 1875, but no words are even there added declaring that he shall in future be a Judge of the High Court. The result would therefore seem to follow that he is for the future to be excluded from the High Court, and to officiate only in the Court of Appeal after the present Chancellor’s retirement from office, though the entire bearing of the rest of the Act seems to rebut this conclusion. The section is amended by s. 3 of the Act of 1875, repealing the limitation made in the number of the Judges, and enacting that the provisions as to the appointment and style of the Judges shall not apply to the Lord Chancellor, thus implying, as it seems, that future Chancellors shall continue Judges of the High Court notwithstanding the omission of words providing for their appointment as such. The last clause of the section itself, which provides for the presidency of the Court being vested in the Lord Chief Justice in the absence of the Lord Chancellor, seems also to intend that the Chancellor, shall in ordinary cases, be president of the Court.

6. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*

Constitution of
 Court of
 Appeal.

S. 6 is now repealed (Act of 1875, s. 33, and Sched. 2); and s. 4 of that Act seems intended to be in substitution for it until change be made. It is as follows:—“ Her Majesty’s Court of Appeal in this Act,
 “ and in the principal Act referred to as the Court of Appeal, shall be con-
 “ stituted as follows: There shall be five ex officio Judges thereof, and
 “ also so many ordinary Judges, *not exceeding three at any one time,*
 “ as Her Majesty shall from time to time appoint. The ex officio Judges
 “ shall be the Lord Chancellor, the Lord Chief Justice of England, the
 “ Master of the Rolls, the Lord Chief Justice of the Common Pleas, and
 “ the Lord Chief Baron of the Exchequer. The first ordinary Judges of
 “ the said Court shall be the present Lords Justices of Appeal in Chancery,
 “ and such one other person as Her Majesty may be pleased to appoint by
 “ Letters Patent. Such appointment may be made either before or after
 “ the commencement of this Act; but if made before, shall take effect at

*The words in
 italic have since
 been repealed,
 39 & 40 Vict.
 c. 59, s. 15.*

36 & 37 VIC.
c. 66.

§§ 7, 8.

“ the commencement of the Act. The ordinary Judges of the Court of
“ Appeal shall be styled Lord Justices of Appeal. The Lord Chancellor
“ may by writing addressed to the President of any one or more of the
“ following divisions of the High Court of Justice, that is to say, the
“ Queen’s Bench Division, the Common Pleas Division, the Exchequer
“ Division, and the Probate, Divorce, and Admiralty Division, request the
“ attendance at any time, except during the times of the spring or summer
“ circuits, of an additional Judge from such division or divisions (not
“ being ex officio Judge or Judges of the Court of Appeal), at the sittings
“ of the Court of Appeal, and a Judge, to be selected by the division from
“ which his attendance is requested, shall attend accordingly. Every ad-
“ ditional Judge, during the time that he attends the sittings of Her
“ Majesty’s Court of Appeal, shall have all the jurisdiction and powers of
“ a Judge of the said Court of Appeal, but he shall not otherwise be
“ deemed to be a Judge of the said Court or to have ceased to be a Judge of
“ the division of the High Court of Justice to which he belongs.

“ **S. 54** of the principal Act is hereby repealed, and instead thereof
“ the following enactment shall take effect: No Judge of the said Court
“ of Appeal shall sit as a Judge on the hearing of an appeal from any
“ judgment or order made by himself, or made by any Divisional Court of
“ the High Court of which he was and is a member.

“ Whenever the office of an ordinary Judge of the Court of Appeal be-
“ comes vacant, a new Judge may be appointed thereto by Her Majesty by
“ Letters Patent.”

Vacancies by
resignation of
Judges and
effect of
vacancies
generally.

7. The office of any Judge of the said High Court of Justice, or of the said Court of Appeal, may be vacated by resignation in writing, under his hand, addressed to the Lord Chancellor, without any deed of surrender; and the office of any Judge of the said High Court shall be vacated by his being appointed a Judge of the said Court of Appeal. The said Courts respectively shall be deemed to be duly constituted during and notwithstanding any vacancy in the office of any Judge of either of such Courts.

Qualifications
of Judges.
Not required to
be Serjeants-
at-Law.

8. Any barrister of not less than ten years’ standing shall be qualified to be appointed a Judge of the said High Court of Justice; and any person who if this Act had not passed would have been qualified by law to be appointed a Lord Justice of the Court of Appeal in Chancery, or has been a Judge of the High Court of Justice of not less than one year’s standing, shall be qualified to be appointed an ordinary Judge of the said Court of Appeal: Provided, that no person appointed a Judge of either of the said Courts shall henceforth be required to take, or to have taken, the degree of Serjeant-at-Law.

As to abolition
of the necessity
of Serjeant’s
degree for
Judge.

The necessity of the qualification of serjeancy is abolished, and this is no doubt an improvement; but some duties are, as we believe, by old Acts of Parliament made exercisable only by Judges of the degree of the coif, and a power ought to have been given by this Act that all such duties

may be exercised by Judges of the High Court, though not of the degree of the coif.

36 & 37 VIC.
c. 66.

§§ 9—11.

9. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*

This section is repealed by the Act of 1875, s. 33, and Sched. 2, and s. 5 of that Act seems to have been substituted for it, which is as follows:—
“ All the Judges of the High Court of Justice and of the Court of Appeal
“ respectively, with the exception of the Lord Chancellor, shall hold their
“ offices as such Judges respectively during good behaviour, subject to a
“ power of removal by Her Majesty, on an address presented to Her
“ Majesty by both Houses of Parliament. No Judge of either of the said
“ Courts shall be capable of being elected to or of sitting in the House of
“ Commons. Every Judge of either of the said Courts (other than the
“ Lord Chancellor) when he enters on the execution of his office, shall
“ take, in the presence of the Lord Chancellor, the Oath of Allegiance,
“ and Judicial Oath as defined in the Promissory Oaths Act, 1868. The
“ Oaths to be taken by the Lord Chancellor shall be the same as hereto-
“ fore.” The form is precisely the same as that of the repealed section,
save that the words “ with the exception of the Lord Chancellor,” which
seem originally to have been omitted by oversight, are replaced in the new
section. It leaves the condition of most of the Judges as it has been
hitherto, but alters that of the Master of the Rolls, who up to the date of
the Act has been eligible to and competent to sit in the House of
Commons, though of late he has seldom done so.

Tenure of office
of Judges and
oaths of office.
Judges not to
sit in the House
of Commons.

Clause of Act
of 1875 sub-
stituted.

10. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*

This section also is repealed (Act of 1875, s. 33, and Sched. 2); and s. 6 of the Act of 1875 seems substituted for it. It is as follows:—“ The
“ Lord Chancellor shall be president of the Court of Appeal; the other
“ ex officio Judges of the Court of Appeal shall rank in the order of their
“ present respective official precedence. The ordinary Judges of the Court
“ of Appeal, if not entitled to precedence as Peers or Privy Councillors,
“ shall rank according to the priority of their respective appointments as
“ such Judges.

Precedence of
Judges.

Clause of Act
of 1875 sub-
stituted.

“ The Judges of the High Court of Justice who are not also Judges of
“ the Court of Appeal, shall rank next after the Judges of the Court of
“ Appeal, and among themselves (subject to the provisions of the principal
“ Act contained as to existing Judges), according to the priority of their
“ respective appointments.”

11. Every existing Judge, who is by this Act made a Judge of the High Court of Justice or an ordinary Judge of the Court of Appeal, shall, as to tenure of office, rank, title, salary, pension, patronage, and powers of appointment or dismissal, and all other privileges and disqualifications, remain in the same condition as if this Act had not passed; and, subject to the change effected in their jurisdiction and duties by or in pursuance of the provisions of this Act, each of the said existing Judges shall be capable of performing and liable to perform all duties which he would have been capable of

Saving of right
and obligations
of existing
Judges.

Amended 38 &
39 Vict. c. 77,
s. 8.

36 & 37 VIC.
c. 66.

§ 11.

performing or liable to perform in pursuance of any Act of Parliament, law, or custom if this Act had not passed. No Judge appointed before the passing of this Act shall be required to act under any Commission of Assize, Nisi Prius, Oyer and Terminer, or Gaol Delivery, unless he was so liable by usage or custom at the commencement of this Act.

Service as a Judge in the High Court of Justice, or in the Court of Appeal, shall, in the case of an existing Judge, for the purpose of determining the length of service entitling such Judge to a pension on his retirement, be deemed to be a continuation of his service in the Court of which he is a Judge at the time of the commencement of this Act.

Admiralty
Judges and
Registrar.

This section is amended by s. 8 of the Act of 1875, which recites verbatim the first clause of the section and then proceeds:—" And
" whereas the Judge of the High Court of Admiralty is by the principal
" Act appointed a Judge of the High Court of Justice : and whereas such
" Judge is, as to salary and pension, inferior in position to the other puisne
" Judges of the Superior Courts of Common Law, but holds certain ecclesi-
" astical and other offices in addition to the office of Judge of the High
" Court of Admiralty : and whereas it is expedient that such judge, if he
" be willing to relinquish such other offices, should be placed in the same
" position as to rank, salary, and pension as the other puisne Judges of the
" Superior Courts of Common Law : Be it enacted that if the existing
" Judge of the High Court of Admiralty under his hand signifies to the
" Lord Chancellor in writing, before the commencement of the principal
" Act, that he is willing to relinquish such other offices as aforesaid, and
" does, before the commencement of the principal Act resign all other
" offices of emolument held by him except the office of Judge of the
" High Court of Admiralty, he shall, from and after the commencement
" of the principal Act, be entitled to the same rank, salary, and pension as
" if he had been appointed a Judge of the High Court of Justice im-
" mediately on the commencement of the principal Act, with this addition,
" that, in reckoning service for the purposes of his pension, his service as
" a Judge of the High Court of Admiralty shall be reckoned in the same
" manner as if the High Court of Justice had been established at the time
" of his accepting the office of Judge of the High Court of Admiralty, and
" he had continued from such time to be a Judge of the said High Court
" of Justice. The present holder of the office of Registrar of Her Majesty
" in Ecclesiastical and Admiralty causes, shall, as respects any appeals in
" which he would otherwise be concerned coming within the cognizance
" of the Court of Appeal, be deemed to be an officer attached to the
" Supreme Court ; and the office, so far as respects the duties in relation
" to such appeals as aforesaid, shall be deemed to be a separate office
" within the meaning of s. 77 of the principal Act, and may be dealt
" with accordingly. He shall be entitled, in so far as he sustains any loss
" of emoluments by or in consequence of the principal Act or this Act, to
" prefer a claim to the Treasury in the same manner as an officer paid out
" of fees whose emoluments are affected by the passing of the principal
" Act is entitled to do under s. 80 of the principal Act.

" Subject as aforesaid, the person who is at the time of the passing of
" this Act Registrar of Her Majesty in Ecclesiastical and Admiralty Causes
" shall, notwithstanding anything in the principal Act or this Act, have
" the same rank and hold his office upon the same tenure and upon the

“ same terms and conditions as heretofore ; but it shall be lawful for Her Majesty by Order in Council made upon the recommendation of the Lord Chancellor, with the concurrence of the Treasury, to make, notwithstanding anything contained in any Act of Parliament, such arrangements with respect to the duties of the said last mentioned office, either by abolition thereof or otherwise, as to Her Majesty may seem expedient : Provided that such Order shall not take effect during the continuance in such office of the said person so being registrar at the time of the passing of this Act, without his assent.

36 & 37 VIC.
c. 66.

§ 12.

“ Every Judge of the Probate, Divorce, and Admiralty Division of the said High Court of Justice appointed after the passing of this Act shall, so far as the state of business in the said division will admit, share with the Judges mentioned in s. 37 of the principal Act the duty of holding sittings for trials by jury in London and Middlesex, and sittings under commissions of assize, oyer and terminer, and gaol delivery.”

This amended section applies specifically to the Judge of the High Court of Admiralty in respect of his pension, the rule generally applicable by the latter clause of the original section applies to the Judges of the New Courts, who were at its commencement existing Judges, and is intended to assimilate generally the position of the Judge of the High Court of Admiralty to that of the other Judges.

It is obvious that s. 6 of the Act of 1875 has also a slight bearing on the enactment of this section, since the Lord Chancellor is an existing Judge made by the Act of 1873 a Judge of the High Court of Justice, and special provisions are by s. 6 of Act of 1875 made with regard to his rank, and by other sections as to his privileges, but this criticism seems more merely verbal than substantial.

12. If, in any case not expressly provided for by this Act, a liability to any duty, or any authority or power, not incident to the administration of justice in any Court, whose jurisdiction is transferred by this Act to the High Court of Justice, shall have been imposed or conferred by any statute, law, or custom upon the Judges or any Judge of any of such Courts, save as herein-after mentioned, every Judge of the said High Court shall be capable of performing and exercising, and shall be liable to perform and empowered to exercise every such duty, authority, and power, in the same manner as if this Act had not passed, and as if he had been duly appointed the successor of a Judge liable to such duty, or possessing such authority or power, before the passing of this Act. Any such duty, authority, or power, imposed or conferred by any statute, law, or custom, in any such case as aforesaid, upon the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron, shall continue to be performed and exercised by them respectively, and by their respective successors, in the same manner as if this Act had not passed.

Provisions for
extraordinary
duties of Judges
of the former
Courts.

36 & 37 VIC.
c. 66.

§§ 13, 14.

Assimilation
of offices of
Judges.

The like policy of assimilating in every respect the duties and offices of all the ordinary Judges of the High Court is still further carried out in this, by extending to every Judge of the High Court of Justice the liability and authority to perform every office not incident to the administration of justice which any individual Judge of any of the existing Courts was liable to perform, except the duties of the Lord Chancellor, Lord Chief Justice, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Chief Baron, which it still continues to the holders of these specific offices only.

Salaries of
future Judges.
Partly repealed
38 & 39 Vict.
c. 77, s. 33, and
Sched. 2.
See also same
Act, s. 29.

13. Subject to the provisions in this Act contained with respect to existing Judges, there shall be paid the following salaries, which shall in each case include any pension granted in respect of any public office previously filled by him, to which the Judge may be entitled ;

To the Lord Chancellor, the sums hitherto payable to him ;

To the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, the same annual sums which the holders of those offices now respectively receive ;

To each of the ordinary Judges of the Court of Appeal ; and,
To each of the other Judges of the High Court of Justice,
the sum of five thousand pounds a year.

No salary shall be payable to any additional Judge of the Court of Appeal appointed under this Act ; but nothing in this Act shall in any way prejudice the right of any such additional Judge to any pension to which he may be by law entitled.

The portion of this clause referring to the additional Judges of the Court of Appeal is repealed by s. 33 of the Act of 1875 and Sched. 2.

Retiring pen-
sions of future
Judges of High
Court of Justice
and ordinary
Judges of Court
of Appeal.

14. Her Majesty may, by Letters Patent, grant to any Judge of the High Court of Justice, or to any ordinary Judge of the Court of Appeal who has served for fifteen years as a Judge in such Courts, or either of them, or who is disabled by permanent infirmity from the performance of the duties of his office, a pension, by way of annuity, to be continued during his life :

In the case of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, the same amount of pension which at present might under the same circumstances be granted to the holder of the same office :

In the case of any ordinary Judge of the Court of Appeal or any other Judge of the High Court of Justice, the same amount of pension which at present might under the same circumstances be granted to a Puisne Justice of the Court of Queen's Bench.

36 & 37 VIC.
c. 66.

§§ 14, 15.

15. Subject to the provisions in this Act contained with respect to existing Judges, the salaries, allowances, and pensions payable to the Judges of the High Court of Justice, and the ordinary Judges of the Court of Appeal respectively, shall be charged on and paid out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland, or the growing produce thereof: such salaries and pensions shall grow due from day to day, but shall be payable to the persons entitled thereto, or to their executors or administrators, on the usual quarterly days of payment, or at such other periods in every year as the Treasury may from time to time determine.

Salaries and
pensions how
to be paid.

36 & 37 VIC.
c. 66.

§ 16.

PART II.

Jurisdiction and Law.

Jurisdiction of
High Court of
Justice.

16. The High Court of Justice shall be a Superior Court of Record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following; (that is to say,)

- (1.) The High Court of Chancery, as a Common Law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court;
- (2.) The Court of Queen's Bench;
- (3.) The Court of Common Pleas at Westminster;
- (4.) The Court of Exchequer, as a Court of Revenue, as well as a Common Law Court;
- (5.) The High Court of Admiralty;
- (6.) The Court of Probate;
- (7.) The Court for Divorce and Matrimonial Causes;
- (8.) *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*
- (9.) The Court of Common Pleas at Lancaster;
- (10.) The Court of Pleas at Durham;
- (11.) The Courts created by Commissions of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissions:

The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the Judges of the said Courts, respectively, sitting in Court or Chambers, or elsewhere, when acting as Judges or a Judge, in pursuance of any statute, law, or custom, and all powers given to any such Court, or to any such Judges or Judge, by any statute; and

also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdictions so transferred.

36 & 37 VIC.
c. 66.

§§ 16, 17.

By this section it seems intended to pass in the very broadest words all the jurisdiction of all the Courts mentioned, whether equitable or at common law. The common law jurisdiction of the Court of Chancery, though more ancient than its equity jurisdiction, is almost forgotten now in the much greater importance of its equity jurisdiction, but is still of some importance chiefly in the jurisdiction, to hold plea upon *scire facias*, to repeal the Queen's Letters Patent when made against law, or obtained on false suggestions, as to which see note to next section. It has also a jurisdiction at Common Law to hold plea of petitions, *monstrans de droit*, traverses of office, &c., when the Crown has been advised to do any act, or is put in possession of any lands or goods against the rights of a subject. It also may hold plea of all personal actions where any officer or servant of the Court itself is party concerned, and of tithes of forest land granted by the Crown and claimed by a stranger against the Crown's grantee and of executions of statutes or recognizances in nature thereof by stat. 23 H. 8, c. 6, though where a cause came to issue of fact in a common law cause, the Chancellor was unable to try it, not having originally power to summon a jury, but had to seek the assistance of the Queen's Bench, and even, it seems, when judgment was given in Chancery upon a demurrer, was liable to be overruled on writ of error to the Queen's Bench (a).

Common Law
and Equity
jurisdiction
transferred to
new Courts.

Common Law
jurisdiction of
Court of
Chancery.

In pursuance of this section the following case has been decided. Judgment had been obtained in Common Pleas Division; application was made that a stop-order on fund in Chancery made in Chambers might be passed by registrar. Registrar hesitated because by old practice order could not be made until a charging order had been obtained in the Court in which the action had been tried. Semble because Judges in Chancery were not Judges of the Superior Courts at Westminster. The Vice-Chancellor made the order at once (b). Also in a suit of *Nicholas v. Dracachis* powers given by 17 & 18 Vict. c. 104, s. 15, to Court of Chancery were exercised by Judge of Probate Division (c).

The 8th subsection of this section is repealed by Act of 1875, s. 33 and Sched. 2, and s. 9 of Act of 1875 is now enacted in lieu of it, which is as follows:—"The London Court of Bankruptcy shall not be united or consolidated with the Supreme Court of Judicature, and the jurisdiction of that Court shall not be transferred under the principal Act to the High Court of Justice, but shall continue the same in all respects as if such transfer had not been made by the principal Act, and the principal Act shall be construed as if such union, consolidation, and transfer had not been made. Provided that—1. The office of Chief Judge in Bankruptcy shall from time to time be filled by such one of the Judges of the High Court of Justice appointed since the passing of the Bankruptcy Act, 1869, or with his consent of such one of the Judges appointed prior to the passing of the last-mentioned Act as may be appointed by the Lord Chancellor to that office; and 2. The appeal from the London Court of Bankruptcy shall lie to the Court of Appeal in accordance with the principal Act."

Clause of Act
of 1875 sub-
stituted.

17. There shall not be transferred to or vested in the said High Court of Justice, by virtue of this Act,—

Jurisdiction
not transferred
to High Court.

(a) 3 Blackstone's Commentaries, 21st Ed. pp. 47-48.

(b) *Hopewell v. Barnes*, W. N. 1876, 28; see case also reported in 1 Ch. D. 630; 33 L. T. N. S. 777; 24 W. R. 629.

(c) 1 P. D. 72; 45 L. J. P. D. A. 45; 24 W. R. 461.

36 & 37 VIC.
c. 66.

§ 17.

- (1.) Any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy :
- (2.) Any jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster :
- (3.) Any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind :
- (4.) Any jurisdiction vested in the Lord Chancellor in relation to grants of Letters Patent, or the issue of commissions or other writings, to be passed under the Great Seal of the United Kingdom :
- (5.) Any jurisdiction exercised by the Lord Chancellor in right of or on behalf of Her Majesty as visitor of any College, or of any charitable or other foundation :
- (6.) Any jurisdiction of the Master of the Rolls in relation to records in London or elsewhere in England.

Scire facias to
repeal patents
still retained
by Lord
Chancellor.

Jurisdiction in
Lunacy.

By this section it will be seen that the most important branch of the existing Common Law jurisdiction of the Lord Chancellor, viz., the holding plea by *scire facias* to repeal a patent, is not passed to the High Court. It is to be supposed that this will be retained as a personal jurisdiction of the Lord Chancellor, as it is not given to the High Court, and of course not to the Court of Appeal. The jurisdiction as to the custody of the persons or estate of idiots, lunatics, and persons of unsound mind, is also saved from transfer to the High Court, and this, which seems to have been left unprovided for or not sufficiently provided for by the Act of 1873, is now dealt with by s. 7 of the Act of 1875, which provides as follows :—" Any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind, shall be exercised by such Judge or Judges of the High Court of Justice or Court of Appeal as may be intrusted by the sign manual of Her Majesty or her successors with the care and commitment of the custody of such persons and estates ; and all enactments referring to the Lords Justices as so intrusted shall be construed as if such Judge or Judges so intrusted had been named therein instead of such Lords Justices. Provided that each of the persons who may at the commencement of this principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a judge of the Court of Appeal, and is intrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid."

With regard to the jurisdiction of the Judges intrusted in Lunacy under s. 7 of the Act of 1875, it may be well to remark here that the Lords Justices of Appeal in Chancery having formerly been in the habit of making orders under the Trustee Acts intituled both in Chancery and in Lunacy matters, and feeling themselves under this Act incapacitated from so doing by the taking away of their primary jurisdiction in Chancery, have by virtue of s. 51 of this Act been appointed additional Judges of the Chancery

Division for the purpose of restoring the power (a). With reference to this power see case (b).

36 & 37 VIC.
c. 66.

With reference to the 6th subsection of this section, it has been held that the jurisdiction to be retained by the Master of the Rolls is in relation to the records of which the custody is given to him by the Public Record Act, 1 & 2 Vict. c. 94, and that the Register of Patent proprietors is not such a record; although, therefore, before this Act the Master of the Rolls had sole jurisdiction in Chancery over this register he has no such jurisdiction now. It has passed to the High Court by s. 16, subs. 1 (c).

§ 18.

Note to 6th
sub-section.

The Master of the Rolls has jurisdiction as Keeper of the Records to direct the amendment of a clerical error in a specification filed in the Patent Office such jurisdiction being saved by this subsection. Where such amendment has been directed notice of the order should be given to the Commissioners of Patents, so that the specification may be reprinted (d).

Master of Rolls
may direct
amendment of
clerical error in
specification
filed in patent
office.

18. The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and vested in such Court all jurisdiction and powers of the Courts following; (that is to say,)

Jurisdiction
transferred to
Court of
Appeal.

- (1.) All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy:

It has been held under this subsection that the Court of Appeal has no jurisdiction to hear an original petition (e).

- (2.) All jurisdiction and powers of the Court of Appeal in Chancery of the county palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the duchy and county palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a Judge of re-hearing or appeal from decrees or orders of the Court of Chancery of the county palatine of Lancaster:

Under this subsection it has been held that the Court of Appeal has no further jurisdiction in these matters than the Lords Justices of Appeal had before the passing of the Act (f). See O. LVIII., r. 2.

- (3.) All jurisdiction and powers of the Court of the Lord

- (a) 20 S. J. 24, 45.
- (b) *Re Lamotte*, 4 Ch. D. 325; 36 L. T. 231; 25 W. R. 149.
- (c) *Re Morgan's Patent*, W. N. 1876, 27; 24 W. R. 245.
- (d) *Re Johnson's Patent*, 5 Ch. D. 503.
- (e) *In Re Dunraven Adare Coal and Iron Co.*, W. N. 1875, 192; 33 L. T. N. S. 371; 24 W. R. 37.
- (f) *Re Commission Sale and Sample Room Co.*, 21 S. J. 46.

36 & 37 VIC.
c. 66.

§§ 18, 19.

Warden of the Stannaries assisted by his assessors, including all jurisdiction and powers of the said Lord Warden when sitting in his capacity of Judge :

- (4.) All jurisdiction and powers of the Court of Exchequer Chamber :

And under this subsection the jurisdiction in error from the Lord Mayor's Court (*a*).

- (5.) All jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy.

Appeals from
High Court.

19. The said Court of Appeal shall have jurisdiction and power to hear and determine Appeals from any judgment or order, save as herein-after mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such Appeals shall be allowed, as may be made pursuant to this Act.

For all the purposes of and incidental to the hearing and determination of any Appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such Appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.

When an appeal
will lie under
this section
and when not.

Under this clause a doubt has been expressed by the Queen's Bench Division, whether an appeal lies from its Order on a matter of mandamus (*b*). See **O. LVIII.**, **O. LXII.**, but see particularly **O. LVIII.**, r. 9. An appeal will lie under this section from a judgment of the Divisional Court refusing to order a County Court judge to settle and sign a case on appeal under the County Courts Acts and rules (*c*). It has been held that no appeal lies on an interpleader summons disposed of summarily under s. 14 of the Common

(*a*) *Le Blanch v. Reuter's Telegram Co.*, 1 Ex. D. 408 ; 34 L. T. N. S. 691 ; 25 W. R. 115.

(*b*) 20 S. J. 150, 151.

(*c*) *Clarke v. Roche*, 36 L. T. N. S. 727.

Law Procedure Act (a). But where a Judge has ordered judgment to be entered on an interpleader issue after motion for judgment before him, an appeal lies under this section and **O. XL., r. 4**, notwithstanding **O. I., r. 2**, and the provision in Common Law Procedure Act, 1860, **s. 17 (b)**. No Order by consent, nor as to costs only, is subject to appeal, save by leave of the Court, **s. 49, post**, p. 70. See further as to Orders not subject to appeal, **s. 50, post**, p. 71.

36 & 37 VIC.
c. 66.

§ 19.

An action had been brought in the Court of Passage at Liverpool, and judgment entered for £411, subject to opinion of Common Pleas Division under the Court of Passage Act, 1853. The case was argued, and the decision below affirmed. The defendant gave notice of appeal, and applied to the Court of Passage to stay execution. The Judge thought the application should be to the Common Pleas Division. The defendant then applied to the Master in Chambers, who sent the matter to the Judge, and thereupon application was made to Pollock, B., in Chambers, who held he had no jurisdiction, under **O. LVIII., r. 16**, to deal with it, not being a Judge of Common Pleas Division, and not having heard the case. The application was renewed before the Court of Appeal, and **O. LIII., r. 3**, cited. The Court held they had no power to make the order *ex parte* to stay execution, but gave leave for short notice of motion, Mellish, L.J., expressing surprise that Pollock, B., had deemed he had no jurisdiction, and intimating an opinion that a Judge at Chambers has power to act for any Division. See **s. 39**. He observed also, that the jurisdiction of the Court of Appeal in such a case is primary, not appellate, though application should first be made to the Court from whose decision the appeal is (c). As to criminal matters, the Court of Appeal has no jurisdiction. See **s. 47**, and Act of 1875, **s. 19 (d)**.

In the case of *Jones v. Victoria Graving Dock Co.* (e), it was held, that no appeal was given by this Act where an action had been referred before the Judicature Acts by consent to an arbitrator, and he had made his award in May, 1876, stating a special case for the opinion of the Court under the Common Law Procedure Act, 1854, **s. 5**, providing in the award that the parties should not bring any writ of error in respect of any of the matters referred. An appeal cannot be re-heard by the Court of Appeal, the remedy is by new action in the High Court of Justice to have judgment set aside : *Flower v. Lloyd* (f).

The Act 39 & 40 Vict. c. 59, **s. 20**, has further cut down, or perhaps may be taken as declaratory in limiting the power of appeal, and has provided that, in any case where by Act of Parliament the decision of any Court whose jurisdiction is transferred to the High Court shall be final, no appeal shall lie from the decision of the High Court or any Judge thereof (g). The Court of Appeal now possesses under this section the power conferred by **s. 5** of the Divorce Act, 1860, to require the Queen's Proctor to argue matters deemed necessary by it (h).

(a) *Dodds v. Shepherd*, 1 Ex. D. 75 ; 45 L. J. Ex. D. 457 ; 34 L. T. N. S. 358 ; 24 W. R. 322.

(b) *Witt v. Parker*, 46 L. J. (App.) Q. B. D. 450 ; 36 L. T. N. S. 538 ; 25 W. R. 518 ; W. N. 1877, 118.

(c) *Macleay v. Vaughan*, 20 S. J. 723.

(d) See also *Reg. v. Steel*, 2 Q. B. D. 37 ; 46 L. J. M. C. 1 ; 35 L. T. N. S. 534 ; 25 W. R. 34 ; *Reg. v. Fletcher*, 2 Q. B. D. 43 ; 46 L. J. M. C. 4 ; 34 L. T. N. S. 538 ; 25 W. R. 149.

(e) 2 Q. B. D. 314 ; 36 L. T. N. S. 347 ; 25 W. R. 501.

(f) 25 W. R. 793 ; 21 S. J. 708.

(g) See *Westhead v. Westhead and Gordon*, 2 P. D. 1 ; 46 L. J. P. D. A. 32 ; 25 W. R. 35 ; see also *Wallis v. Wallis*, 2 P. D. 141 ; 36 L. T. N. S. 161 ; 25 W. R. 387 ; *Gladstone v. Gladstone*, 2 P. D. 143 ; 25 W. R. 387 ; *Robinson v. Robinson*, 2 P. D. 77 ; 36 L. T. N. S. 122 ; 25 W. R. 388.

(h) *Le Sueur v. Le Sueur*, 2 P. D. 79 ; 36 L. T. N. S. 276 ; 25 W. R. 402.

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20. *Repealed by 39 & 40 Vict. c. 59, s. 24.*

§§ 20-22.

21. *Repealed by 39 & 40 Vict. c. 59, s. 24.*

Transfer of
pending busi-
ness.

22. From and after the commencement of this Act the several jurisdictions which by this Act are transferred to and vested in the said High Court of Justice and the said Court of Appeal respectively, shall cease to be exercised, except by the said High Court of Justice and the said Court of Appeal respectively, as provided by this Act; and no further or other appointment of any Judge to any Court whose jurisdiction is so transferred shall be made except as provided by this Act: Provided, that in all causes, matters, and proceedings whatsoever which shall have been fully heard, and in which judgment shall not have been given, or having been given shall not have been signed, drawn up, passed, entered, or otherwise perfected at the time appointed for the commencement of this Act, such judgment, decree, rule, or order may be given or made, signed, drawn up, passed, entered, or perfected respectively, after the commencement of this Act, in the name of the same Court, and by the same judges and officers, and generally in the same manner, in all respects as if this Act had not passed; and the same shall take effect, to all intents and purposes, as if the same had been duly perfected before the commencement of this Act; and every judgment, decree, rule, or order of any Court whose jurisdiction is hereby transferred to the said High Court of Justice or the said Court of Appeal, which shall have been duly perfected at any time before the commencement of this Act, may be executed and enforced, and, if necessary, amended or discharged by the said High Court of Justice and the said Court of Appeal respectively, in the same manner as if it had been a judgment, decree, rule, or order of the said High Court or of the said Court of Appeal; and all causes, matters, and proceedings whatsoever, whether Civil or Criminal, which shall be pending in any of the Courts whose jurisdiction is so transferred as aforesaid at the commencement of this Act, shall be continued and concluded, as follows (that is to say), in the case of proceedings in Error or on Appeal, or of proceedings before the Court of Appeal in Chancery, in and before Her Majesty's Court of Appeal; and, as to all other proceedings, in and before Her

Majesty's High Court of Justice. The said Courts respectively shall have the same jurisdiction in relation to all such causes, matters, and proceedings as if the same had been commenced in the said High Court of Justice, and continued therein (or in the said Court of Appeal, as the case may be) down to the point at which the transfer takes place; and, so far as relates to the form and manner of procedure, such causes, matters, and proceedings, or any of them, may be continued and concluded, in and before the said Courts respectively, either in the same or the like manner as they would have been continued and concluded in the respective Courts from which they shall have been transferred as aforesaid, or according to the ordinary course of the said High Court of Justice and the said Court of Appeal respectively (so far as the same may be applicable thereto), as the said Courts respectively may think fit to direct.

36 & 37 VIC.
c. 66.

§ 22.

On the Act coming into operation the following orders as regards this section were published on Nov. 3rd, 1875. Chancery Division. Pending Business. Notice.—The Master of the Rolls directs that subject to any special order which may be made in any cause, matter or proceeding pending in his Court on the 1st of Nov. 1875, the following course of procedure shall be adopted.

Orders as to
pending
business.

That all causes, matters, and proceedings, except causes (not being short causes) in which neither notice of motion for a decree has been served, nor replication been filed before the 1st Nov. 1875, shall so far as relates to the form and manner of procedure, be continued and concluded in the same manner as they would have been in the High Court of Chancery.

That all such pending causes (not being short causes) in which, up to the 1st Nov. 1875 no notice of motion for a decree has been served or replication filed, shall be continued in the same manner as they would have been continued in the High Court of Chancery up to the time at which such notice of motion or replication could have been served or filed, and shall from that period be continued according to the ordinary course of the High Court of Justice.

That any party to a pending cause may apply by summons at Chambers that for special reasons a direction may be given for continuing such cause according to the ordinary course of the High Court of Justice. *Similar directions were given by each of the Vice-Chancellors.*

Common Law Divisions. Pending Proceedings. Notice.—In order to save the expense and inconvenience of separate applications for directions as to the form and manner of procedure in actions commenced before the 1st of Nov. instant, the Judge sitting at Chambers hereby directs:—(1.) That where no declaration has been delivered, the action shall be continued according to the ordinary course of the High Court of Justice as if it had been commenced in that Court; (2.) That in all other cases the action shall be continued up to the close of the pleadings, according to the practice of the Court in which it was brought, and afterwards according to the provisions of the Judicature Acts, subject, however, to an order, at the instance of either party, to proceed at

36 & 37 VIC.
c. 66.

§ 22.

Business pending at the commencement of the operation of the Acts, how proceeded with, whether under old or new practice.

any stage according to the course prescribed by those Acts. By Order, Judges Chambers, Nov. 2, 1875.

Under these Orders it was held in the Chancery division that an application *ex parte* to set down a cause for hearing under the old practice could only be made by consent (a). Where an action was commenced under the old practice, and cause tried, and bill of exceptions tendered, a question was raised whether the judgment roll should be carried in and a note of error lodged under the old practice, or whether the matter should be brought before Court of Appeal under the new practice, the Court held the old practice should be followed (b). In all cases, at the time when notice of motion would have been given under the old practice, issue must be joined under the new without filing any affidavits unless by consent (c). In an action by a broker on a policy of insurance, application was made to allow the action to be prosecuted under the new practice, and an order was made so as to allow the person interested in the policy to be a plaintiff, and to obtain discovery from him (d). But in an action on a bond against a surety, declaration was delivered, Oct. 26th, 1875, to which a statement of defence was delivered, but it was struck out by the Master, who refused defendant's application to be allowed to proceed under the Judicature Acts. The defendant stated he had a good defence in equity, but did not state what it was, nor give any further information on it. On appeal, the Master's order was confirmed and appeal dismissed with costs; the Judge stating that if good reason could be shown for the reform, he would have allowed it, but the statement of defence was too bald and the affidavit did not supplement it (e).

It has indeed been held that in all cases where a *bonâ fide* counter-claim is in question, the new procedure will be allowed (f). So also where a reference is *bonâ fide* required (g). So under this clause plaintiff was allowed in suit pending at the commencement of the Act to file interrogatories which before the Act he could only have administered under a bill for discovery under 6 & 7 Will. 4, c. 76, s. 19 (h); but where to a declaration under the old practice defendant sought to continue under the new for the purpose of setting up counter-claim, and the application was adjourned from Saturday to Monday for an affidavit, and on Monday the defendant did not produce the affidavit but delivered a statement of defence, including the counter-claim, it was ordered to be struck out, and the defendant was compelled to plead as of old (i). So also change to new practice was refused unless the application for it were made in proper time (k); and in one case Denman, J., held that matters had gone on too far and too long under the old practice to make the change (l). In cases such as those

(a) *Perkins v. Slater*, 1 Ch. D. 83; 45 L. J. Ch. D. 224; 24 W. R. 39.

(b) 20 S. J. 131.

(c) *Att.-Gen. v. Wilshire*, 1 Ch. D. 89.

(d) *Clarkson v. British and Foreign Marine Insurance Co.*, W. N. 1876, 9; 20 S. J. 177.

(e) W. N. 1876, 52; 20 S. J. 282.

(f) *Thomas v. The Queen*, W. N. 1875, 218; 20 S. J. 79; *Tennant v. Walton*, W. N. 1875, 219; 20 S. J. 79; *Trinacria Steam Navigation Co. v. Richardson*, W. N. 1875, 219; 20 S. J. 79; *Norton Cannock Coal Co. v. Merriman*, W. N. 1875, 219; 20 S. J. 79; *Anon.*, 20 S. J., two cases, 81; one case *Anon.*, W. N. 1875, 218; *Cappeleus v. Brown*, W. N. 1875, 231; 20 S. J. 98; *Anon.*, W. N. 1875, 228; 20 S. J. 101; *Anon.*, W. N. 1875, 230; 20 S. J. 101; *Harrison v. Markins*, 20 S. J. 161.

(g) 20 S. J. 1875, 80.

(h) *Ramsden v. Brearley*, 33 L. T. N. S. 322; W. N. 1875, 199; 20 S. J. 30.

(i) *Lowther v. Bellairs*, W. N. 1875, 220; 20 S. J. 80.

(k) *Ware v. Gwynne*, W. N. 1875, 240; 20 S. J. 121.

(l) *Anon.*, W. N. 1876, 86; 20 S. J. 321.

mentioned where counter-claims have been allowed to be set up, it is considered as though the defence had arisen after the action brought on the analogy of **O. XX., r. 3**, which see (*a*).

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c. 66.

§§ 22, 23.

Under the words beginning "And all causes, matters, and proceedings "whatsoever," the Master of the Rolls held, that on the passing of the Act, the jurisdiction which the Courts were to have in future was immediately granted as to existing cases, and thereupon he dismissed a demurrer to a bill for a mere money demand obtainable at Common Law, though before the Act the demurrer might have been valid (*b*).

But a declaration under the old practice will not be allowed to stand for a statement of claim unless it contains as much information as would be needed in statement of claim to make it valid (*c*).

Where a case had been referred at trial before the coming into operation of the Act, but the award not made till after the Acts came into force, it was held that such a case falls within the first branch of the section as "fully heard" so far as the Court is concerned (*d*).

So also where decree had been made before the commencement of the Act but no petition of appeal presented, it was held this clause did not apply, and the appeal was ordered to be under the new practice (*e*).

On Jan. 11th, 1876, application was made to Probate Division to receive affidavits headed, "In Her Majesty's Court of Probate." They had been sent to Natal in the autumn of the preceding year, and had been sworn in Natal on Nov. 2nd. They were received, under the circumstances, with an intimation that where reasonably possible all affidavits in the old form must be re-sworn as amended (*f*).

Under this section the Court ordered that an appeal from a judgment on demurrer should be tried before a trial of issues of fact, and that the trial of issues of fact should be postponed until after the decision of the Court of Appeal on the demurrer (*g*).

The Court of Appeal has no jurisdiction to transfer cause pending in Chancery at the time of the Acts coming into operation from one Judge of the Chancery division to another (*h*). (See also **O. LI.**)

Evidence in a cause pending on the 2nd Nov., 1875, having been taken by affidavit, but the affidavits not having been filed before the rule as to pending causes was laid down by the Judges, the rule was held to apply, notwithstanding some of the parties moved that the evidence might be taken by affidavit, this motion being opposed by others, evidence was directed to be taken *vivâ voce* under the new practice, costs being reserved (*i*).

23. The jurisdiction by this Act transferred to the said Rules as to

(*a*) *Cappeleus v. Brown*, W. N. 1875, 231; 20 S. J. 98; *Trevena v. Watts*, W. N. 1875, 250; 20 S. J. 140.

(*b*) *Vagg v. Shippey*, 20 S. J. 131.

(*c*) *Barrow v. Cooke*, W. N. 1875, 220; 20 S. J. 80.

(*d*) *Lloyd v. Lewis*, 2 Ex. D. 7; 46 L. J. (App.) Q. B. D. 81; 35 L. T. N. S. 539; 25 W. R. 102. See **O. XL., r. 3**; see also *Cruikshank v. Floating Baths Co., Limited*, 1 C. P. D. 260; 45 L. J. C. P. D. 684; 34 L. T. N. S. 733; 24 W. R. 644.

(*e*) *Bartlam v. Yates*, 1 Ch. D. 13; 33 L. T. N. S. 338; 24 W. R. 19.

(*f*) *In re Goods of Woods*, 20 S. J. 211.

(*g*) *London Joint Stock Bank v. Mayor and Aldermen of London and Sarah Griesiel*, W. N. 1875, 251.

(*h*) *In Re Hutley*, 1 Ch. D. 11; 45 L. J. Ch. D. 79; 33 L. T. N. S. 337.

(*i*) *Patterson v. Wooler*, 1 Ch. D. 464; 2 Ch. D. 586; 45 L. J. Ch. D. 274; 34 L. T. N. S. 415.

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c. 66.

§§ 23, 24.

exercise of
jurisdiction.

High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such Rules and Orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such Rules or Orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts.

This section, in fact, provides for the retainer of the old practice so far as it is not expressly changed by the rules passed under this Act, and when taken with the section which defines the jurisdiction of the different divisions, it will be seen that the course of procedure has not been reduced to an uniform system.

Law and equity
to be con-
currently
administered.

24. In every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the Rules following:

Plaintiffs and
petitioners to
be relieved on
equitable
grounds.

(1.) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.

First sub-
section.

This sub-section treats of the case of a plaintiff or petitioner, and gives to him in all Courts the same rights and the same relief as he would heretofore have been entitled to in the Court of Chancery alone.

An action was brought before the commencement of the Act for goods sold and delivered, to which a plea of coverture was put in. Replication that defendant possessed separate estate, and application that proceedings might go on under Judicature Acts. Application was allowed only on terms of paying all costs from writ downwards (a).

Defendants to
be allowed

(2.) If any defendant claims to be entitled to any equitable

(a) *Hancock v. De Niceville*, W. N. 1875, 230; 20 S. J. 98.

estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act.

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c. 66.

§ 24.

(Subs. 2).

defence on
equitable
grounds.

This takes up the case of a defendant claiming relief on equitable grounds against the action brought against him : in such a case the course which formerly would have to be adopted was, that the defendant at law came in as a plaintiff in Equity and obtained, on the grounds of his equitable defence, an injunction restraining the plaintiff from prosecuting the action against him, or an order for delivery up of the instrument on which the action had been brought, or the like.

Second sub-
section.

The Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125, ss. 83—86,) made some attempt to enable Courts of Law to deal with cases of this sort by allowing defendants to plead defences on equitable grounds, but the construction given to the provision was not a broad one, and the enactment was held to be confined to cases where an absolute and unconditional perpetual injunction only would be granted in Equity (a), and even in cases of this kind, the jurisdiction of the Court of Chancery to injunction was not ousted, at least before judgment or before verdict, so that in fact the best remedy continued to be by Bill in Chancery for injunction (b) : by the present enactment the Courts are required to give to every such equitable estate relief or ground of relief, and to every equitable defence so alleged the same effect by way of defence against the claim of such plaintiff or petitioner as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act. It will also be seen that by subs. 5 the power of restraining by prohibition or injunction any cause or proceeding pending in the High Court of Justice or the Court of Appeal is forbidden to any Court, so that the only way of rendering such a defence as above mentioned effectual will be to rely on it as a defence in the Court in which the action is properly depending.

Equitable de-
fences under
Common Law
Procedure Act,
1854.

Difference of
present enact-
ment.

When judgment has been obtained, and an arrangement subsequently

Cases on this
subsection.

(a) *Mines Royal Societies v. Magnay*, 10 Ex. 489 ; *Woodhouse v. Farebrother*, 5 E. & B. 277 ; *Wood v. Copper Miners' Co.*, 17 C. B. 561 ; *Clark v. Laurie*, 1 H. & N. 452 ; *Wakley v. Froggat*, 2 H. & C. 669 ; 33 L. J. Ex. 5.

(b) *Evans v. Brembridge*, 8 D. M. & G. 100 ; *Protheroe v. Phelps*, 4 W. R. 189 ; *Pooley v. Harradine*, 5 W. R. 405 ; see also *Davies v. Stainbank*, 6 D. M. & G. 679 ; see *Terrell v. Higgs*, 1 De G. & J. 388.

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c. 66.

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(Subs. 2.)

entered into, which would make execution inequitable, it will now be stayed by a Judge in Chambers (a). An attempt to alter the usual effect of a mortgage was made, unsuccessfully however, under this subsection, thus: to an action of ejectment by mortgagee against mortgagor, the latter set up in defence his right to redeem, but the Master ordered the defence to be struck out, unless the defendant brought in debt and interest into Court within six days. On appeal to Judge in Chambers the Judge refused any order, as the plaintiff, he said, was entitled to enter, unless redeemed (b). An action was brought on a deed; the defence pleaded was that the deed was in equity void and should be set aside on the ground of undue influence, and thereupon an application was made to transfer the action into the Chancery Division under s. 34. It was held by Hall, V.-C., that, as the main question to be tried related to rectification, setting aside or cancellation of a deed, it ought to be assigned to the Chancery Division, and the Order was made accordingly (c). But in *Attwood v. Miller* (d). To an action for rent defendant pleaded as set-off the price of butcher's meat delivered, and claimed, among other matters, specific performance of an agreement to grant a lease. The Judge refused to strike out this counter-claim. But in the case of *Mostyn v. West Mostyn Coal and Iron Co., Limited* (e), Action for rent was brought in Common Pleas Division, defence put in that the plaintiff had leased property, of which part, to his knowledge, was not his, and that the defendant had thereby been put to expense, and he claimed rectification of the lease. The plaintiff demurred, and an application was made for transfer of the action to the Chancery Division. It was refused, for on demurrer to such a defence the Court would treat the deed as though already reformed or set aside. So also in another case, the plaintiff was the mother of six illegitimate children by the defendant. In consideration of the plaintiff taking care of the children, the defendant promised to pay her £4,500 on the sale of an estate belonging to him, or £300 a year by quarterly instalments. An action had been brought, and judgment recovered by plaintiff for quarterly payments in arrear. Subsequent payment not having been made as they fell due, the present action was commenced, but the defendant having now sold his estate, and a Chancery suit having terminated respecting the sale, the plaintiff now claimed in the alternative either to recover the payments in arrear or to be paid the sum of £4,500, or the investment of such sum in the name of trustees for herself and her children. Application on the part of defendant, that the statement of claim should be amended as embarrassing, or the suit transferred to Chancery Division. Denman, J. The plaintiff does not pray for the execution, but for the creation of a trust. At this stage, at all events, there is no necessity for a transfer (f).

A., a solicitor, having from time to time advanced money to two clients, B. and C., to enable them to carry on building transactions, took mortgage from them to secure money already due (including bills of costs), and further advances. The deed provided that A. might, immediately after the execution of the mortgage, enter into possession of the property, and let and manage it as he should think fit, and should retain a commission of £5 per cent. on gross receipts as remuneration for collecting rents, &c., and

(a) *Per Quain, J.*, 20 S. J. 100.

(b) *Hanbury v. Noone*, W. N. 1875, 260; 20 S. J. 161.

(c) *Padwick v. Scott*, W. N. 1876, 74; 20 S. J. 299, 320; see s. 34.

(d) W. N. 1876, 11; 20 S. J. 218.

(e) 1 C. P. D. 145; 45 L. J. C. P. D. 401; 34 L. T. N. S. 325; 24 W. R. 401; see also *Anon.*, W. N. 1876, 106; 20 S. J. 342; *Breslaner v. Barwick*, 24 W. R. 901; 20 S. J. 663; *Earp v. Henderson*, 3 Ch. D. 254; 45 L. J. Ch. D. 738; 34 L. T. N. S. 844.

(f) *Anon.*, 20 S. J. 342.

if rents and profits should be insufficient for such payments, A. might apply the same in payment of the interest upon the principal due, and should pay the costs, &c., out of his own money, and the amount so paid should become part of the principal to be thereby secured. A. prepared a third deed, and declined to make any further advances, unless B. and C. executed it. Before the execution thereof, accounts were submitted by A. to B. and C., and signed by them. A. instituted suit for foreclosure, B. and C. in their answers claimed to have the accounts opened, to have the bills of costs included in the security taxed, and that the plaintiff should be disallowed the sums charged as commission. The suit was at issue before the 1st Nov., 1875. Held that under s. 24, subs. 2 and 3 of the Act of 1873, the Court had power to entertain the equitable defence raised by the answers in the same way as it might have done if a crossbill had been filed under the old practice, or a counterclaim put in under the new. Held also that commission ought not to have been claimed, and the costs must be taxed as prayed (a). See notes to next subsection; also case of *Child v. Stenning* (b), *post*, p. 225.

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§ 24.

(Subs. 2, 3.)

(3.) The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any Order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim,

Defendant's to be allowed same relief on equal or equitable grounds properly pleaded in defence as if suing as plaintiffs.

And relief against third parties served with notice.

(a) *Eyre v. Hughes*, 2 Ch. D. 148; 45 L. J. Ch. D. 395; 34 L. T. N. S. 211; 24 W. R. 597.

(b) 5 Ch. D. 695; 46 L. J. Ch. D. 523; 36 L. T. N. S. 426; 25 W. R. 519.

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§ 24.

(Subs. 3.)

Institutes in
England "re-
convention"

and brings in
third parties.

Cases under
this subsection.
Equitable
defence.

Relief against
third parties.

as if he had been duly sued in the ordinary way by
such defendant.

This subsection provides to the Courts now established the power of giving to any defendant all such relief against the plaintiff, either on legal or equitable grounds, as shall be properly claimed by the defendant on his pleadings, and as the said Courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner. This procedure is altogether new in English law where no judgment could in any cause be given against a plaintiff beyond dismissing his claim with costs, but if anything further were sought by a defendant, he was bound to bring a cross action or suit, which in its procedure was conducted strictly as an original suit, unless some special order were made in relation thereto by the Court which had jurisdiction with regard to it, but it in some respects resembles the procedure known in many of our colonial courts, called reconvention, by which a cross claim is allowed to be made by any defendant against the plaintiff upon any action brought by him against the defendant, with a few exceptions, and when a claim in reconvention is made the plaintiff pleads to it in like manner as the defendant pleads to the plaintiff's claim, and the two actions, as in fact they are, go on together, and are tried together, and a joint judgment is given on both against either party as the case may be, or perhaps against both, that is to say, against one on one point, and against the other on another point. This subsection goes on to allow the Courts the power to grant to any defendant also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or order of the Court, as might properly have been granted against any such person, if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose, and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against any such claim as if he had been duly sued in the ordinary way by such defendant. This, in fact, gives a man once made defendant to a cause, a very large power of involving other persons, whose rights in any way affect his position, in the cause, but perhaps it is useful that, when a question is coming into court, every one really concerned in it, or whose rights interfere with the rights of a party in it, should be easily brought before the Court for its decision. It is only to a defendant that this right is given, for there is no reason that a plaintiff should not properly bring, by his original proceeding, the parties he deems essential to the cause before the Court, and it does not seem expressly stated, but we think it follows, that every person thus brought before the court may obtain thereupon such relief against the plaintiff, as well as against the defendant, who has brought him before the Court, and possibly against other defendants also, as he shall seem to be entitled to, and shall have properly claimed.

With reference to this and the preceding subsection, it will be well to compare **O. XIX., r. 3, O. XXII., r. 5, O. XXIX., r. 13.** It has been held, that the limitation of liability in cases of collision at sea, under **s. 504** of the Merchant Shipping Act, 1854, is ground of equitable defence, not a mere plea to damage, and in consequence such relief should be claimed in the statement of defence by virtue of these **subs. 2 and 3 (a).** With reference to the second part of this subsection, the following cases are

(a) *Wahlberg v. Young*, 45 L. J. C. P. D. 783; 24 W. R. 847.

worthy of consideration. An action was brought against Smith & Co. for goods sold and delivered: the goods had been ordered by Collie & Co. in their own names, and delivered to them; before the time of payment they became bankrupts. The statement of claim alleged that the plaintiff had discovered that Collie & Co. had been authorised by Smith & Co. to order, and that they did order, the goods on the joint account of themselves and Smith & Co., or on account of Smith & Co. as undisclosed principals. Smith & Co. served the trustee in bankruptcy of Collie & Co. under **O. XVI.**, stating that they claimed indemnity from Collie & Co.'s estate, on the ground that the contract had been entered into by Collie & Co., and that the trustee had the goods, or the proceeds of them, in his hands. The Court of Bankruptcy granted an injunction to restrain Smith & Co. from taking or continuing any further proceedings against the trustee. The Court of Appeal held the Order erroneous, as the Court of Bankruptcy had no jurisdiction to try the question as between the plaintiff and the defendant, and reversed the Order (*a*). Notwithstanding that in this case the Court seemed to favour the power introduced by the subsection under comment, the general tendency of the cases has run to narrow it as far as was almost possible: in fact, Lord Justice Mellish has openly stated that, in framing the rules the Judges to whom that duty was assigned deliberately cut the power down to a mere capacity to bind a third party by the decision in the action instead of enabling relief to be had against him, and a Court has rarely, if ever, been found courageous enough to obey the section, and go beyond the rules which will be found in **O. XVI., rr. 17, 18, 19, 20 and 21.** In fact, we believe the provisions as to third party notices have been found of very little benefit in practice. The case in which this statement was made by Lord Justice Mellish is that of *Treleven v. Bray* (*b*), in which it was distinctly ruled that one defendant could not have counterclaim under this section against another defendant, which doctrine has been confirmed by similar ruling in other cases (*c*). Indeed, it has been in other cases freely admitted that the rules are narrower than the section (*d*). The principle of the rule nevertheless, in *Treleven v. Bray* (*e*), has not always been adhered to, for where it was desired to raise points between co-defendants, Vice-Chancellor Hall expressed his opinion that, though in **O. XVI., r. 17**, he thought the notice there mentioned applied only to third persons, yet he made an Order to deliver defence and counterclaim to co-defendant interested (*f*).

It seems reasonably clear that where the only object of the service is to bind the party served, by the result of the proceedings between the original parties, that course is within both this subsection and the **O. XVI., rr. 17, 18, 19, 20 and 21**, and the Order will be made to serve (*g*),

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(*a*) *Ex parte Smith*, 2 Ch. D. 51; 45 L. J. Bankcy., 116; 34 L. T. N. S. 603; 24 W. R. 310.

(*b*) 1 Ch. D. 176; 45 L. J. Ch. D. 113; 33 L. T. N. S. 827; 24 W. R. 198.

(*c*) *Warner v. Twining*, 24 W. R. 536; see also *Swansea Shipping Co. v. Duncan*, 45 L. J. Q. B. D. 423; judgment in this case was afterwards reversed, see 1 Q. B. D. 644; 45 L. J. (App.) Q. B. D. 638; 35 L. T. N. S. 879; 25 W. R. 233.

(*d*) *Macdonald v. Bode*, W. N. 1876, 23; 20 S. J. 241.

(*e*) 1 Ch. D. 176; 45 L. J. Ch. D. 113; 33 L. T. N. S. 827; 24 W. R. 198.

(*f*) *Shephard v. Beane*, 2 Ch. D. 223; 45 L. J. Ch. D. 429; 24 W. R. 363; see *Furness v. Booth*, 4 Ch. D. 586; 45 L. J. Ch. D. 112; 23 W. R. 267, *post*, p. 28, and *Harris v. Gumble*, W. N. 1877, 142; 21 S. J. 651; see also *Northampton Waterworks v. Easton*, *per* Ld. C. J., 20 S. J. 467.

(*g*) *Pearson v. Lane*, W. N. 1875, 248; 20 S. J. 122; *Measures v. Thomas and Jones*, W. N. 1875, 203; 20 S. J. 55; *Tebbs v. Lewis*, W. N. 1875, 204; 20 S. J. 56; *Dawes v. Thornton*, W. N. 1876, 74; 20 S. J. 299; see also *Furness v. Booth*, 4 Ch. D. 586; 46 L. J. Ch. D. 112; 25 W. R. 267.

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(Subs. 3.)

though in every case the power to order a third party to be served is discretionary, and it will not be used if it seems to lead to the prejudice of the plaintiff (*a*). Defendants served third persons against whom they claimed indemnity; they consented to come in and defend; plaintiffs objected, unless they admitted liability, on their doing so. Ordered that they should be defendants, they admitting cause of action and liability (*b*). Here it will be seen third persons were actually admitted to contest points in dispute, but not with other defendants. But in *Furness v. Booth* (*c*), in an action to restrain B. and his five tenants from permitting foul water to flow from five houses belonging to B. into a water-course of the plaintiff: C., one of the five tenants, delivered a defence denying the plaintiff's title and the fact of the nuisance, and making a so-called counterclaim against B., averring a contract on his part for quiet enjoyment, and claiming indemnity from him against any damages and costs which he, C., might be compelled to pay the plaintiff. The Master of the Rolls said, that a pleading which claimed no cross-relief against the plaintiff, either alone or with some other person, was no "counterclaim," and did not fall within **O. XXII., r. 5**. Under this subsection the relief sought by C. required to be pleaded, and it was necessary to give notice of the pleading to the co-defendant under the Act and under **O. XVI., r. 17**. He thought the delivery of the pleading to one already a defendant was sufficient notice under the last-mentioned rule. He would therefore merely order the word "counterclaim" to be struck out; but as in case of *Shephard v. Beane* (*d*), it had been, as he thought, incorrectly laid down, that a counterclaim was the right form of pleading between co-defendants, he gave no costs of the application.

Where the plaintiffs sued as joint-lessees of a railway, the defendant pleaded two separate counterclaims, one against each of co-plaintiffs, such counterclaims were allowed to be maintained (*e*).

A. agreed to purchase lands of B., who purported to sell under power of sale in a mortgage. After the agreement, A. received notices from D., E., and F., claiming title to the lands, and thereupon refused to complete: B. brought action for specific performance. On motion by A. for leave to serve D., E., and F. with notice of motion to make them parties to the action, the Court gave such leave (*f*), but, on the hearing of the motion, refused the Order (*g*).

A claim by plaintiffs for not accepting 183 chests of shellac according to contract of 10th Nov. 1874, whereby defendants ordered of plaintiffs 183 chests of fine button shellac at £12 10s. cost and freight, free from gum, and a maximum of 3 per cent. of rosin; that plaintiffs bought the shellac, and at the defendant's request paid the freight. Defence, delivered 23rd of March, 1876, that defendants bought as brokers for principals as plaintiffs knew, and defendants were not personally liable, Rea & Co. being principals as to part, and Thew & Brothers as to residue; that defendants

(*a*) *Bower v. Hartly*, 1 Q. B. D. 652; 46 L. J. (App.) Q. B. D. 126; 24 W. R. 941.

(*b*) *Commissioners of Waterford v. Veale, Bogg and Evans*, W. N. 1876, 23; 20 S. J. 241; see *Seligman v. Mansfield*; *White v. Mansfield*, W. N. 1875, 240; 20 S. J. 121.

(*c*) 4 Ch. D. 586; 45 L. J. Ch. D. 112; 25 W. R. 267.

(*d*) See n. (*f*), *ante*, p. 27.

(*e*) *Manchester, Sheffield, and Lincolnshire Railway Co. and London and N. W. Railway Co. v. Brooks*, 2 Ex. D. 243; 46 L. J. Ex. D. 244; 36 L. T. N. S. 103; 25 W. R. 413.

(*f*) *Harvey v. Davey*, W. N. 1876, 141; 24 W. R. 515; sub nom. *Harry v. Davey*.

(*g*) 2 Ch. D. 721; 45 L. J. Ch. D. 697; 34 L. T. N. S. 842; 24 W. R. 576.

did not request plaintiffs to pay freight for them : that shellac was not according to quality contracted for, and therefore defendants and their principals respectively refused to accept the different parcels. Reply delivered 31st March, joinder of issue and demurrer. On 12th Feb. 1876, Thew and Rea were respectively served with notices under **O. 16, r. 18**, and this subsection, that the defendants were sued by the plaintiffs for non-acceptance of 183 cases of shellac under contract to purchase by defendants from plaintiffs, that defendants claimed to be indemnified by them against liability, in respect of fifty chests, on the ground that defendants ordered the chests of plaintiffs on their behalf as their agents. Rea and Thew entered appearance within eight days, and application was made to Court under **O. XVI., r. 21**, for directions as to the mode of having the question in the action determined. The Court directed statement of defence to be first delivered. Application was then renewed on affidavits, setting out contracts between defendants and Rea and Thew respectively, of 11th Nov. 1874, for purchase of fifty chests, in similar terms, to contract between plaintiff and defendants. The Court held that Rea and Thew were properly cited, and directed that Thew should be allowed to appear at the trial to contest the question of the quality of the shellac, and no other question. Thew and Rea to be bound by the result ; question of costs to be decided after the trial by a Judge, subject to appeal to the Court (a) ; here also a third party was allowed to contest an important question, but again with the plaintiff alone, not with a co-defendant. A shipowner brought an action against Knoop, consignee of goods, under bill of lading, claiming damages for delay in unloading. Knoop served a notice under **O. XVI., r. 18**, upon London Banking Association, who had bought the cargo afloat, and Order was obtained that they be at liberty to defend with Knoop. They took out summons for leave to give notice to and bring in a fourth party, to whom they had resold cargo afloat. Field, J., refused the Order at Chambers, but afterwards in Court said, that had this subsection been brought to his notice he would have allowed the Order which was granted by the Court (b). But where a defendant made a counterclaim against the plaintiff and a third party, the third party could not make a fresh counterclaim against the defendant so claiming against him (c). See also on this subsection the case of *Child v. Stenning* (d), and *Padwick v. Scott* (e). All the cases here cited are also to be noted on consideration of the different rr. 17, 18, 19, 20 and 21, of **O. XVI.**, or some of them.

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c. 66.

§ 24.

(Subs. 3, 4.)

(4.) The said Courts respectively, and every Judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act.

Equitable
rights appear-
ing incident-
ally, to be
noticed.

(a) *Benecke v. Frost*, 1 Q. B. D. 419 ; 45 L. J. Q. B. D. 693 ; 34 L. T. N. S. 728 ; 24 W. R. 669.

(b) *Fowler v. Knoop*, W. N. 1877, 68 ; 36 L. T. N. S. 219.

(c) *Street v. Gover*, 2 Q. B. D. 498 ; 46 L. J. Q. B. D. 582 ; 36 L. T. N. S. 766 ; 25 W. R. 750.

(d) *Post*, p. 225, 5 Ch. D. 695 ; 46 L. J. Ch. D. 523 ; 36 L. T. N. S. 426 ; 25 W. R. 519.

(e) *Post*, p. 225, 2 Ch. D. 736 ; 45 L. J. Ch. D. 350 ; 24 W. R. 723.

36 & 37 VIC.
c. 66.

§ 24.

(Subs. 4, 5.)

No injunction
against suit or
action.

Court may di-
rect stay of
proceedings in
any matter
before it.

This subsection provides in general terms for the recognition by all Courts of all equitable estates, rights, titles, duties, and liabilities appearing incidentally, in the same manner as they would be recognised by the Court of Chancery under the same circumstances.

(5.) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any Judgment, Decree, Rule, or Order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such Order as shall be just.

Fifth sub-
section.

This, it has been already noticed, puts a stop in general to injunctions against judicial proceedings; it provides, however, that any Court may order a stay of its own proceedings, and that any person, whether a party or not to any cause or matter, who might before the Act have been entitled to apply for an injunction to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which any of the proceedings may have been taken, may apply by motion for a stay thereof either generally or so far as may be right, and the Court may thereupon make such order as shall be just.

Injunctions
still in
Bankruptcy.

When it is said puts a stop in general to injunctions, it must be remembered that in many cases in bankruptcy the Court of Bankruptcy has power to restrain actions against the bankrupt by injunction (Bankruptcy Act, 1869, s. 13), and this power is in nowise interfered with (a). In

(a) *Ex parte Ditton*, 1 Ch. D. 557; 45 L. J. Bankcy. 87, 141; 34 L. T. N. S. 109; 24 W. R. 289.

the case of *In re South of France Pottery Works Syndicate*, it was held in the Court of Appeal that where a petition for winding up a company has been presented, a Judge of the Chancery Division has no power to restrain an action against the company, or a contributory, in another division, but application must be made to the division in which the action is pending (a). It was at first doubted by the Master of the Rolls whether this power was not gone, and he recommended application to the Court in which the action desired to be stayed was pending (b), which, on the contrary, had already directed an application to him (c). The doubt, however, as to the jurisdiction of the Chancery Division must be now considered at rest (a). The other Divisions, when applied to, have constantly stayed actions on the ground of a winding up of the defendant company (d). Indeed, they have done so in other cases also whenever it was clear that an injunction in Chancery would have been granted formerly (e), but have refused where that was not clear (f). So also application being made to stay proceedings in an action on two solicitors' bills of costs, it was shown that writ had been issued on Oct. 21st, declaration filed Oct. 30th. Statement of defence, Nov. 10th. Reply, Nov. 27th. A summons had been taken out in the Rolls for an order to tax the bills, and thereupon it was asked to stay proceedings in the action. It was objected that the application was too late. Lindley, J., said he would make the order in such form as would put the plaintiff in the same position as if the defendant had taken prompt measures, and ordered further proceedings in the action to be stayed, the defendant to pay plaintiff's costs of the action, subsequent to writ, up to that time, including costs of the application; defendant undertaking to obtain order to tax with all practicable speed (g). So where execution was about to issue in an action, another action having been brought in Chancery Division by the defendant against the plaintiff for an account, a stay of execution was allowed in the Common Law Division on terms of payment into Court of the amount of the execution (h). But stay of action will never be allowed where no actual defence already exists on the ground of a future defence being probable (i). So on application to stay action against executors on a bill of exchange given by testator; one of the executors had commenced an action for administration in Chancery, and was in a position to obtain a decree. The Queen's Bench Division stayed the action on terms that the executor should obtain a decree for administration within a week (k). Indeed, the law as to injunction under this clause has been minutely canvassed in the case of

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c. 66.

§ 24.

(Subs. 5.)

Cases on this subsection, power of Court to stay proceedings.

(a) W. N. 1877, 205; 25 W. R. 870; 21 S. J. 768; but see **O. LI., r. 2a**, as to the power of a Judge of the Chancery Division to transfer to himself an action pending in another division on a motion *Ex parte*, *Field v. Field*, W. N. 1877, 98.

(b) *Re People's Garden Co.*, 1 Ch. D. 44; 45 L. J. Ch. D. 129; 24 W. R. 40; *Re Morriston Patent Fuel and Brick Co.*, W. N. 1877, 20.

(c) *Kingchurch v. People's Garden Co.*, 1 C. P. D. 45; 45 L. J. C. P. D. 131; 33 L. T. N. S. 381; 24 W. R. 41.

(d) *Walker v. Banagher Distillery Co.*, 1 Q. B. D. 129; 45 L. J. Q. B. D. 134; 33 L. T. N. S. 502; *Moore v. City and County Bank*, W. N. 1875, 240; 20 S. J. 122; *Owens v. Steam Coal Co.*, W. N. 1876, 9; 20 S. J. 178.

(e) *Geoghegan v. Domeb*, W. N. 1875, 229; 20 S. J. 97; *Bell v. Lowe*, W. N. 1875, 229.

(f) *Wood v. Wakefield*, W. N. 1876, 238; 20 S. J. 100.

(g) *Anon.*, W. N. 1876, 39; 20 S. J. 261.

(h) *Kevers v. Mitchell*, W. N. 1876, 53; 20 S. J. 280.

(i) *Frakes v. Breslow*, W. N. 1875, 239.

(k) *Harman v. Harman*, 20 S. J. 431.

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c. 66.

§ 24.

(Subs. 5, 6.)

Application
may be made
ex parte.

Garbutt v. Farcus (a), and it has been held, both by Vice-Chancellor Malins and on appeal, that where a defence is open on a case which would formerly have required an injunction from Chancery to stay the action against the defendant, the defendant must now plead that defence in the action in which he is sued. Application for stay of proceedings, where absolutely needed, may be made *ex parte* (b). In case just noted actions were stayed, and plaintiff restrained *ex parte* from commencing others until further order, plaintiff to show cause on a day named, otherwise stay to be absolute as well as restraining order. But, where a suit had been commenced in Sept. 1875, for rescinding an agreement, and for an injunction restraining a common law action on the plaintiff moving for an injunction, defendant entered into an undertaking: the motion was, on the 11th Nov. 1875, renewed and ordered to stand over till cause came on for trial, the undertaking being continued. On the cause coming on, the Court, having regard to this clause, directed the cause to stand over till the action in the Common Law Division was decided (c).

Legal claims to
be recognised
subject to
equities.

(6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every Judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the Common Law or by any custom, or created by any Statute, in the same manner as the same would have been recognised and given effect to if this Act had not passed by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice.

Sixth sub-
section.

This subsection provides that subject to the foregoing provisions for giving effect to equitable rights and other matters of equity and other special provisions, the Courts and every Judge shall recognise and give effect to all legal claims and demands and all estates, titles, duties, obligations, and liabilities existing by the common law or by any custom or created by any statute, in same manner as the same would have been recognized and effectuated if this Act had not passed by any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice.

Example of
difficulties
raised by it.

The principal object of this clause would seem to be to leave the general administration of the law as nearly unchanged as is possible considering the change effected in the principle of the Common Law Courts, but how far in actual operation this will be the result is difficult to say. It is of course easy to tell what the present result of a conveyance to A. and his heirs to the use of B. and his heirs on trust for C. and his heirs would be. We should all at once say that A. and his heirs had no title in the lands whatever, that the whole legal estate in fee was vested in B. and his heirs, and the entire equitable estate in fee in like manner in C. and his heirs.

(a) 1 Ch. D. 155 ; 45 L. J. Ch. D. 133 ; 33 L. T. N. S. 617 ; 24 W. R. 89, 91.

(b) *Blewitt v. Dowling*, W. N. 1875, 202 ; 20 S. J. 55.

(c) *Edwards v. Noble*, 24 W. R. 390.

B. in the contemplation of a Court of law would be sole owner, and C. in like manner in a Court of Equity, which would, however, at the same time recognize B.'s title at law, and would require his presence in dealing with the estate. But why and how far? Simply because his estate only was recognized by the Court of law, in fact to bind him not to deal with the property in any way but under the absolute control of the true owner C. If, however, C.'s title be recognized of its own force in every Court, there seems no more reason for recognizing B.'s title in any Court than there would be in recognizing A.'s, which now is never recognized in any Court. The effect of this subsection appears to be to compel the recognition of B.'s title still, though as that recognition is now limited by the reason for it, that is to say by his absolute possession admitted in the Court of law, and as that reason is altogether taken away by this Act, there is no way of guiding oneself as to what amount of recognition is now to be allowed to the legal as distinguished from the equitable estate in lands, and this may lead to difficulty and uncertainty in conveyancing, which probably was not contemplated when the Act was passed.

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c. 66.

§ 24.

(Subs. 6, 7.)

(7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

Courts to grant full remedies on such conditions as may be right.

The 7th and last subsection merely provides that every Court shall in any cause do complete justice between the parties, and shall not require the aid of any other Court to give full relief, but may give conditional relief, and so avoid multiplicity of suits. With reference to this subsection, see case before cited, *The Manchester, Sheffield, and Lincolnshire Railway Co., and The London and N. W. Railway Co. v. Brooks* (a); see also *Street v. Gover* (b).

Seventh subsection.

The whole of this section involves more important change in legal procedure than any other part of the Act, for it involves some change in the law itself to be administered by the Courts as distinct from the mere machinery by which it is to be administered, which in the main is the subject of the other parts of the Act. The effect of the whole section is, that every Court shall administer in fact such a condition of the law as heretofore was administered complete only in the Court of Chancery,

Change in the law itself.

(a) *Ante*, p. 28; 2 Ex. D. 243; 46 L. J. Ex. D. 244; 36 L. T. N. S. 103; 25 W. R. 413.

(b) *Ante*, p. 29; 2 Q. B. D. 498; 36 L. T. N. S. 766; 25 W. R. 750.

36 & 37 VIC.
c. 66.

§ 25.

(Subs. 1.)

Rules of law
upon certain
points.

Administration
of assets of
insolvent
estates.

and shall endeavour to establish that law *uno flatu*, instead of by steps or degrees as has been done hitherto by the agency of the Courts of Common Law and Equity combined, the one taking some steps which required the aid of the other to do complete justice. The effect of it has been in many cases to change the jurisdiction for the determination of questions, for by these rules any division of the Court has full jurisdiction, where hitherto the Court of Chancery alone could have given full relief or done full justice.

25. And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the Law to be hereafter administered in England as to the matters next hereinafter mentioned: Be it enacted as follows:

(1.) *Repealed by 38 & 39 Vict. c. 77, s. 10, as follows:—*

Sub-section one of clause twenty-five of the principal Act is hereby repealed, and instead thereof the following enactment shall take effect; (that is to say,) in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

The whole section deals with some matters in particular similar in nature to the more general distinctions dealt with in s. 24, *e.g.*,

differences in the mode of dealing with matters similar in their nature dependent on the Court or the circumstances of the administration.

This subsection abolishing some of the distinctions heretofore existing between the dealing with an insolvent estate wound up in Bankruptcy and an insolvent estate of a deceased person, and by amendment, of a company being wound up in Chancery, establishes in the latter two classes of cases in some respects the rules of distribution hitherto prevailing in the former; and it would seem, even if these should in future be altered, the alteration is to extend to the insolvent estates of deceased persons and companies wound up under the High Court. It may be thought that by this enactment all distinction between legal and equitable assets in administration is abolished, and that all assets are henceforward equitable, though this does not seem clear. The clause provides that the same rules as hold in Bankruptcy shall prevail and be observed in administration as to the *respective rights* of secured and unsecured creditors, and as to the debts and liabilities provable; but nothing is said as to the rights of creditors inter se, or as to the respective rights of specialty and simple contract creditors; and it goes on, "and all persons who would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for administration of such estate, or under the winding up of such company, and make such claims against the same, as they may respectively be entitled to by virtue of this Act;" but this carries the matter no further. It is of course fairly open to argument that the respective rights of secured and unsecured creditors are the rights of the one class as contrasted with the other class only, and that nothing is touched as to the other rights of either class or of any members of either class; or it is open to the argument that these words affect all the rights of all creditors, whether secured or unsecured. The former would, however, seem to us the sounder view.

As to the matters where it is clear the law of Chancery is changed, formerly a mortgagee might prove for his whole debt, then realize his security, and then take a dividend on the entire debt to make up a balance, if any due, after such realization (*a*). This has been settled in Chancery after some doubt (*b*), while in Bankruptcy it was long well settled that the security might be sold or valued, and proof was allowed only for the deficit (*c*). The Chancery rule has since the passing of this Act been held to apply in cases where companies were actually in winding up at the commencement of the Act, and where a claim had been ascertained before the Act came into force (*d*), and even where there had been no ascertainment of claims before Act (*e*). By this clause, as it stood originally, the only sort of administration in Chancery touched by it was that of insolvent estates of persons deceased, all other administrations were to be governed by the same rules as formerly; and in the case of secured creditors proving against the insolvent estate of a company being wound up, it was held that they had a right to prove for the entire debt, and apply the security to pay as much as it was sufficient to meet, applying the dividends on the

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c. 66.

§ 25.

(Subs. 1.)

Difference as to
administration
of insolvent
estate in
Chancery and
Bankruptcy.

(*a*) *Mason v. Bogg*, 2 M. & C. 443; 1 Jur. 330; *Armstrong v. Storer*, 14 Beav. 535-538; *Tuckley v. Thompson*, 1 J. & H. 126-130; *Rhodes v. Moxhay*, 10 W. R. 103, V.-C. S.; *Dighton v. Withers*, 31 Beav. 423; *Kellock's Case*, L. R. 3 Ch. 769, 776, 777, 781, LL. JJ.

(*b*) *Greenwood v. Taylor*, 1 R. & M. 185; *Greenwood v. Firth*, 2 Ha. 241, n.; *Tipping v. Power*, 1 Ha. 405; *Marshall v. M'Aravey*, 3 D. & W. 232.

(*c*) *Ex parte Nunn*, 1 Ro. 322; *Ex parte Greenwood*, Buck. 323; see *Ex parte Hopley*, 1 J. & W. 423.

(*d*) *Re Phoenix Bessemer Steel Co.*, 45 L. J. Ch. D. 11; 33 L. T. N. S. 403; 24 W. R. 19; W. N. 1875, 187.

(*e*) *Re Joseph Suche & Co., Limited*, 1 Ch. D. 48; 45 L. J. Ch. D. 12; 33 L. T. N. S. 774; 24 W. R. 184.

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c. 66.

§ 25.

(Subs. 1.)

Cases thereon
since the
passing of the
Acts.

Debts and
liabilities
provable in
bankruptcy.

proof to cover the deficiency until the whole should be paid, instead of taking the course allowed in Bankruptcy of realising the security and proving only for the balance remaining unpaid (a). This difficulty is removed by the amendment, but it does not seem clear that all the differences in administration in such cases are abolished; e.g., in Bankruptcy it is clear that certain rates and taxes and wages mentioned in s. 32 of the Bankruptcy Act of 1869 are payable in priority in full, and it seems almost equally clear that these have had no preference hitherto in the winding up of joint-stock companies (b). It seems open to grave doubt whether the new enactment under the words "the same rules shall prevail and be observed as to (among other matters) debts and liabilities provable, &c., as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt," alters the law in this respect, and assimilates the rule in winding up of companies' estates to that of the estates of bankrupts.

In the case of the *Carmarthen Anthracite Coal & Iron Co.* (c) it was attempted to prevent the appearance of secured creditors, as in Bankruptcy secured creditors have no rights as general creditors until they have elected between their rights on their securities and against the assets. The Master of the Rolls, however, held that the time for election did not arise until proof of debts, and therefore on the petition for winding up they had a good *locus standi*. In the case of *Re The Coal Consumers' Co.* (d), it was attempted to obtain for the landlord of a company being wound up the position of a landlord of a bankrupt with regard to distress for a year's rent in arrear; but the Vice-Chancellor held that this section applied only to conflicting rights as between secured and unsecured creditors and the other matters mentioned, and gave no further rights of distress whatsoever. In the case of *Re Westbourne Grove Drapery & Furnishing Co.* (e), a mortgagee in possession of a lessor to a company, who was under his mortgage in the receipt of the rents payable by the company, claimed in the winding up of the company to have a sufficient sum impounded to meet the whole of the future rents to accrue under the lease, or to have his proof admitted for the total amount of such rents: there was no rent in arrear at the date of his application. Held that the Court would not impound moneys to answer future liabilities when there was no antecedent breach of contract, and that the applicant was neither entitled to have any sum impounded to secure payment of the future rent nor to enter any proof in respect thereof.

As to debts and liabilities provable by the bankrupt laws passed during this century, many liabilities in the nature of debts have been admitted to proof which were not in strict construction debts, and these will now all be provable in administration in the High Court of the insolvent estates of deceased persons and of companies. The last enactment on the subject of debts or liabilities provable in bankruptcy is contained in the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, s. 31, as follows: "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise, shall not be provable in bankruptcy; and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice."

"Save as aforesaid, all debts and liabilities present or future, certain or

(a) *Kellock's Case*, L. R. 3 Ch. 769.

(b) See *Re Coal Consumers' Co.*, 4 Ch. D. 625; 46 L. J. Ch. D. 501; 35 L. T. N. S. 729; 25 W. R. 300.

(c) 45 L. J. Ch. D. 200; 24 W. R. 109; W. N. 1875, 243.

(d) 4 Ch. D. 625; 46 L. J. Ch. D. 501; 35 L. T. N. S. 729; 25 W. R. 300.

(e) 5 Ch. D. 248; 46 L. J. Ch. D. 525; 36 L. T. N. S. 439; 25 W. R. 509.

“ contingent, to which the bankrupt is subject at the date of the order of
 “ adjudication, or to which he may become subject during the continuance
 “ of the bankruptcy by reason of any obligation incurred previously to the
 “ date of the order of adjudication, shall be deemed to be debts provable
 “ in bankruptcy, and may be proved in the prescribed manner before the
 “ trustee in the bankruptcy.

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 c. 66.

§ 25.

(Subs. 1.)

“ An estimate shall be made according to the rules of the Court for the
 “ time being in force so far as the same may be applicable, and where
 “ they are not applicable at the discretion of the trustee, of the value of
 “ any debt or liability provable as aforesaid which, by reason of its being
 “ subject to any contingency or contingencies, or for any other reason, does
 “ not bear a certain value.

“ Any person aggrieved by any estimate made by the trustee as afore-
 “ said may appeal to the Court, and the Court may, if it think the value
 “ of the debt or liability incapable of being fairly estimated, make an
 “ order to that effect; and upon such order being made such debt or
 “ liability shall, for the purposes of this Act, be deemed to be a debt not
 “ provable in bankruptcy; but if the Court think that the value of the
 “ debt or liability is capable of being fairly estimated, it may direct such
 “ value to be assessed, with the consent of all the parties interested, before
 “ the Court itself without the intervention of a jury, or, if such parties do
 “ not consent, by a jury either before the Court itself or some other com-
 “ petent Court, and may give all necessary directions for such purpose,
 “ and the amount of such value when assessed shall be provable as a debt
 “ under the bankruptcy.

“ ‘Liability’ shall, for the purposes of this Act, include any compensation
 “ for work and labour done, any obligation or possibility of an obligation
 “ to pay money or money’s worth on the breach of any express or implied
 “ covenant, contract, agreement, or undertaking, whether such breach
 “ does or does not occur, or is or is not likely to occur or capable of oc-
 “ curring, before the close of the bankruptcy; and generally it shall in-
 “ clude any express or implied engagement, agreement, or undertaking to
 “ pay or capable of resulting in the payment of money or money’s worth,
 “ whether such payment be as respects amount fixed or unliquidated; as
 “ respects time present or future, certain or dependent, on any one con-
 “ tingency or on two or more contingencies; as to mode of valuation
 “ capable of being ascertained by fixed rules or assessable only by a jury,
 “ or as matter of opinion.”

By this section it is submitted the very widest power is given to prove every sort of demand arising out of any promise or contract, and almost the only sort of demand not provable is one for unassessed damages for a tort, which in no case could be considered a debt. There arises one difficulty, however, in applying this clause to cases of administration of the assets of a deceased person, because the point of time defined as the close of the bankruptcy, and period of time defined as the continuance of the bankruptcy, are referred to, which are explained in the Bankruptcy Act, s. 47, but of course cannot be considered at all in the case under consideration. We do not, however, consider that much difficulty will arise by reason of their occurrence: in the first case it would seem that there will be no limit in the case of a deceased person, but that all debts and liabilities to which the deceased person is subject at the date of his death, or to which he may at any time become subject, by reason of any obligation incurred before his death, may be proved against his estate; and in the other case the words occur merely to show that no consideration need be taken of the close of the bankruptcy, even where there is a bankruptcy in the case to which reference is made, *à fortiori* there is no need for such consideration where no bankruptcy has intervened. As to the valuation of annuities and future and contingent liabilities, the earlier bankruptcy statutes contained express provisions concerning them, but now

Debts prov-
 able in Bank-
 ruptcy.

How far section
 applicable to
 general ad-
 ministration of
 insolvent
 estates.

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they all come under the section above-mentioned and are all determinable as in that section is provided.

§ 25.

(Subs. 2, 3.)

Statutes of
Limitation in-
applicable to
express trusts.

(2.) No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.

Remarks on
second sub-
section.

This subsection merely provides by statute for what has always been the principle adopted by Courts of Equity, and seems to be involved in the provisions of s. 24 before examined.

Equitable
waste.

(3.) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Remarks on
third and
fourth sub-
sections.

Subs. 3 and indeed Subs. 4 also, seem to do nothing but re-enact in express terms particular cases, already it would seem, fully dealt with by the provisions of s. 24. It is, we think, much to be regretted that matters have been gone into, in this section, in detail which have been in fact fully dealt with by the general enactments of s. 24. The natural result of action of this sort will be to raise at least an argument, and suggest a doubt whether other matters, only dealt with generally under s. 24, as these are, and not further dealt with specifically, are intended to be dealt with at all. It will probably be argued, if the general dealing under s. 24 were intended, why are these matters, which were equally dealt with generally, made the subject of specific dealing under this section, *expressio unius exclusio alterius*. We do not think such an argument will be sound, but there can be no denial that it will be plausible, and we have little doubt that it will at some time arise by reason of the form of these two sections.

Equitable
waste.

As Equitable waste is referred to in express terms in this section of the Act, it may not be unadvisable to give a short retrospect of what it is, and the principles which have been established with regard to it.

Originally it was supposed at Common Law that the terms, without impeachment of waste, merely exempted the tenant for life committing waste from the penalties of the Statutes of Marlbridge and Gloucester, that is to say, damages treble the value of the waste done and forfeiture of the place wasted, but conveyed to him no property in the thing wasted; but it has been decided (a) this supposition was not well founded, and that the words not only exempted from the penalty, but gave a full property so far as waste was concerned in the land, as if the tenant for life had been owner of the inheritance. This, of course, amounted to a decision that in such circumstances a man was as free in equity as at law, to make a free use of his own property; but cases arose afterwards in which it was considered that this large power might be used by a tenant for life in an unreasonable and unconscientious manner if unrestrained, as where his act went to the destruction of the property placed in settlement over which it was not

(a) *Lewis Bowle's Case*, 11 Co. 79.

intended to give him property beyond his life, and in such cases equity interfered (a). A leading case on this principle was *Vane v. Lord Barnard* (b). Lord Barnard, tenant for life without impeachment of waste of Raby Castle with remainder to his son for life, having some spite against his son, stripped the castle of lead, iron, glass, doors, boards, &c., to the value of £3000. Lord Cowper granted an injunction to stay commission of waste by pulling down the castle, and ordered the castle to be restored at the expense of Lord Barnard, and for that purpose a commission was issued to ascertain what ought to be repaired, and the master was directed to see it done; and it was ordered that the costs of the plaintiff should be paid. In like manner Lord Hardwicke said that if a tenant for life, without impeachment of waste, pulled down farm-houses in general, he would no more scruple to restrain him than he would from pulling down the mansion house (unless, indeed, he pulled down two to make into one in order to bear the burthen but of one), it tending equally to the destruction of the thing settled. So if he should grub up a wood settled so as to destroy the wood absolutely, he should restrain him, as it would be what is termed in *Abraham v. Bubb* (c) extravagant and humorsome waste (d).

Courts of Equity would not in general, in the absence of fraud, and where there was no privity between the parties, interfere at the instance of a party claiming under a legal title by restraining ordinary waste committed by a defendant in possession, but they would grant an injunction to restrain waste of a malicious and destructive character, such as pulling down the capital messuage, stripping the estate of its timber, or such like acts, even though the title of the plaintiff may be disputed by the defendant (e). But where plaintiff in possession seeks to restrain one claiming by adverse title, the Court is inclined to grant injunction, at least where the acts committed destroy or tend to the destruction of the estate (f).

On the principle of restraining a tenant for a limited interest from exercising his legal power in a way contrary to conscience, though a tenant for life without impeachment of waste or tenant in tail after possibility of issue extinct, have power to cut the timber generally of an estate, it has long been held that a Court of Equity would not suffer them to commit equitable waste by felling timber planted for shelter or ornament (g), even though planted by the tenant for life himself (h); and in determining what timber was ornamental the Court would be guided solely by the intention of the settlor, though his taste were incorrect (i).

"The principle has been extended from the ornament of the house to out-houses and grounds, thence to plantations, vistas, avenues, and to all

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§ 25.

(Subs. 3.)

Vane v. Lord Barnard.

Tenant for life, &c., restrained from cutting ornamental timber though unimpeachable of waste.

Ornamental timber.

(a) See *Aston v. Aston*, 1 Ves. Sr. 264.

(b) 2 Vern. 738. See S. C. Prec. in Ch. 454; Gilb. Eq. Rep. 127; 1 Eq. Ca. Abr. 399; 1 Salk. 161. See also *Duke of Leeds v. Earl of Amherst*, 20 Beav. 239.

(c) 2 Freem. 54.

(d) *Aston v. Aston*, 1 Ves. Sr. 264.

(e) *Earl Talbot v. Hope-Scott*, 4 K. & J. 96; *Neale v. Cripps*, 4 K. & J. 472. See *Amryll v. Owens*, 22 L. J. Ch. 995; See post, p. 44.

(f) See *Lowndes v. Bettie*, 33 L. J. Ch. 451; 12 W. R. 399. See post, p. 44.

(g) *Rolt v. Lord Somerville*, 2 Eq. Ca. Abr. 759; *Packington's Case*, 3 Atk. 215; *Strathmore v. Bowes*, 2 Br. C. C. 89; *Chamberlyne v. Dummur*, 1 Br. C. C. 166; 3 Br. C. C. 549.

(h) *Coffin v. Coffin*, Jac. 70.

(i) *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107; *Lord Mahon v. Lord Stanhope*, 3 Mad. 523, n. See *Burges v. Lamb*, 16 Ves. 174; *Coffin v. Coffin*, Jac. 70; *Marker v. Marker*, 9 Ha. 1-17.

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§ 25.

(Subs. 3.)

“ the rides about the estate for ten miles round ” (a). In the case last cited the injunction was extended to two clumps of fir trees on a common two miles from the house, though land of other persons intervened. As Lord Eldon observed, if the principle has been rightly applied, it is very difficult in argument to say it cannot be applied to a common as well as in field-lands, and that the contiguity or remoteness, if *de facto* it was planted for ornament, can alter the principle upon which the rule of the Court is to be applied. And in the case of *Day v. Merry* (b), the principle was extended to trees planted to exclude certain features of the landscape from view. Even although the mansion house may have been pulled down this does not give to tenant for life without impeachment of waste the right to fell trees planted for its shelter and ornament (c), not even where the trustees at the request of the tenant for life had power to pull down the mansion house (d).

Circumstances, however, may make the felling of timber originally planted for ornament justifiable ; “ for if a tempest had produced gaps in a piece of ornamental planting, by which unequal and discordant breaks and divisions were occasioned, it would be going too far to hold that cutting trees to produce a uniform and consistent, instead of an unpleasant and disjointed appearance, would be construed waste ” (e).

The Court of Equity would restrain a tenant for life without impeachment of waste from cutting down saplings not fit to be cut (f), or from cutting underwood before it was of sufficient growth (g) ; but not from felling timber merely because it was not full grown or proper for building (h). A tenant in tail after possibility of issue extinct, is in precisely the same position for these purposes as a tenant for life without impeachment of waste (i) ; but beyond them the doctrine is never carried, and tenant in tail, even though restrained from barring the tail, is not subject to any restriction from equitable waste (k).

The form of order to restrain equitable waste by destruction of timber planted for shelter or ornament, which is generally in use, may be found in *Chamberlyne v. Dummur* (l).

It seems doubtful how far the Court would interfere to prevent merely permissive waste. In *Parteriche v. Powlet* (m), an exception was taken to the master's report, that he had charged tenant for life without impeachment of waste with several sums for the repairs of tenant's houses on the estate. Lord Hardwicke overruled the objection, and said, notwithstanding a tenant for life is without impeachment of waste, he shall be obliged to keep tenants' houses in repair, unless the charge is excessive, and shall not suffer them to run to ruin. In *The Marquis of Lansdowne v. The*

Form of order
restraining
equitable
waste.

Permissive
waste, whether
restrained?

(a) Per Lord Eldon, 6 Ves. 110 ; See *Jebb v. Jebb*, *Johnes v. Johnes*, and *Lord Tamworth v. Lord Ferrers*, cited 6 Ves. 110 ; *Williams v. M'Namara*, 8 Ves. 70 ; *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107.

(b) 16 Ves. 375.

(c) *Morris v. Morris*, 15 Sim. 505.

(d) *Wellesley v. Wellesley*, 6 Sim. 497.

(e) Per Sir Wm. Grant, in *Lord Mahon v. Lord Stanhope*, 3 Mad. 523, n.

(f) *O'Brien v. O'Brien*, Amb. 107.

(g) *Brydges v. Stevens*, 6 Mad. 279.

(h) See Lord Hardwicke in *Aston v. Aston*, 1 Ves. Sr. 266. See also *Coffin v. Coffin*, Jac. 72.

(i) *Att.-Gen. v. Duke of Marlborough*, 3 Mad. 538. See *Abraham v. Bubb*, 2 Show. 69 ; 2 Freem. 53 ; 2 Eq. Ca. Abr. 757 ; 2 Sw. 172 ; *Anon.*, 2 Freem. 278 ; *Cooke v. Whaley*, 1 Eq. Ca. Ab. 400.

(k) *Att.-Gen. v. Duke of Marlborough*, 3 Mad. 498, 532, 536, 538 ; *Saville's Case*, Mos. 224 ; cited also *Lord Glenorchy v. Bosville*, Ca. temp. Talbot, p. 16.

(l) Reg. lib. A. 1781, fol. 452.

(m) 2 Atk. 383.

Marchioness Dowager of Lansdowne (a), an account against the representative of tenant for life without impeachment of waste for dilapidations in and about a mansion house, was refused by Sir John Leach, who, although the case of *Partridge v. Powlet* was cited, expressed himself satisfied that no account of dilapidations could be decreed, observing that, with respect to incumbents, the law was otherwise, and accordingly suits against their representatives were very common, but no instance of such suits by remaindermen had occurred (b); but an account would be granted where there is an express covenant by tenant for life to repair (c).

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(4.) There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Merger.

(5.) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

Suits for possession of land by mortgagors.

This subsection deals with the position of mortgagee and mortgagor which the enactments of s. 24 might otherwise have involved in some difficulty, and provides that, unless the mortgagee have given notice of his intention to take possession, the mortgagor shall be dealt with as owner, and entitled to sue as such, except upon instruments made by him jointly with another person, or in fact where on the face of the instrument he seems to be not the owner.

Fifth subsection: mortgagor and mortgagee.

(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the

Assignment of debts and choses in action.

(a) 1 J. & W. 522.

(b) See also *Lord Castlemaine v. Lord Craven*, 22 Viner's Ab. 523, tit. Waste, pl. 11.

(c) *Marsh v. Wells*, 2 S. & S. 87.

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assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

Assign-
ment of chose
in action.

This subsection makes detailed provision as to the assignment of choses in action, and in some slight respects modifies the enactment of s. 24: it keeps alive the policy of the last foregoing subsection by excepting, as it seems, the assignment of choses in action made by way of charge from being legal assignments. But if they are not legal assignments, it is hard to say what they are; for there is now, we submit, no such thing as an equitable assignment as distinct from a legal assignment. They cease, in fact, to be assignments, and become mere hypothecs. We think, however, that the difficulty will be evaded by this consideration, and that the exception of these assignments in this clause is no enactment one way or other in their case, and that they will consequently be dealt with as hypothecs by s. 24; for they certainly do give, by the existing law, a right or title in equity which under that section must be recognised, and so the exception of them here will not be much harm after all, though it seems to be of very little good. If a charge is made by way of absolute assignment it is intended that the assignee should have power to recover the subject-matter so charged and to give a receipt for it; and in point of fact in good conveyancing such a power is almost always given him in such case, so that the proviso in the subsection is the most important part of it, giving as it does a right of calling on the claimants to interplead, and enlarging the operation of the trustee relief Acts. As to practice of interpleader see O. I., r. 2.

Cases decided
since the com-
mencement of
the operation
of the Acts.

An attempt has been made to stretch this subsection farther than it was intended to extend; thus, a company being under liability to issue shares to one party and receiving notice from other parties that these last were entitled to a lien on such shares, and a notice not to issue them to the claimant to whom the company held themselves liable to make the issue, applied at Chambers for an order that the parties should be ordered to interplead. No evidence was offered of any assignment in writing, nor of any notice of such assignment. It was held that the section did not apply to every case of mere conflicting demands, but only where an assignment, such as mentioned by the subsection, had taken place, or notice of such an assignment had been given to the debtor, trustee, or other person (a).

(a) *Re New Hamburg and Brazilian Rail. Co.*, W. N. 1875, 239; 20 S. J. 121.

On the other hand, in *Lacey v. Wieland*, where defendants in an arbitration had notice of an assignment and also received notice from the trustee in Bankruptcy of the plaintiff in the arbitration requiring payment of the sum awarded, they were ordered to be at liberty to pay into Court the amount of the award less taxed costs and all proceedings against them to be stayed (a). It has been held that under this subsection a cheque is not an assignment by the drawer of the amount of the cheque in the banker's hands to the credit of the drawer (b).

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- (7.) Stipulations in contracts, as to time or otherwise which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity.

Stipulations
not of the
essence of
contracts.

Amended, 38 &
39 Vict. c. 77,
s. 10.

This subsection seems to us also to have become useless after s. 24 was enacted, as it does no more than provide that rights which would now in equity be considered as existing, notwithstanding certain provisions in contracts, shall in all Courts in future be considered as existing.

Seventh sub-
section.

It has been amended by construing the word "passing" of the Act as if it had been the word "commencement" of the Act, an alteration rendered necessary by the delay in the operation of the Act.

- (8.) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made; and any such Order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

Injunctions and
receivers.

This is an important provision. It gives to all the divisions of the Court the powers of mandamus, injunction and granting of receivers in the widest manner, and gets rid of some very nice and intricate questions

Mandamus,
injunction and
receivers.

(a) W. N. 1876, 24; 20 S. J. 241.

(b) *Schroeder v. Central Bank of London*, 34 L. T. N. S. 735; 24 W. R. 710.

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Same as to
receivers.

which used to arise as to the power of the Court to enjoin where the plaintiff, being in possession, the party whom it was sought to enjoin had no claim of title, when it was generally held that the party in possession must be left to his legal right (*a*), unless the acts to be restrained tend to the destruction of the estate or irreparable mischief (*b*). If, on the other hand, the defendant were in possession, and the plaintiff claiming possession sought to restrain him from acts of trespass or waste, the Court would also refuse and leave him to an action for possession (*c*), unless the mischief was of a permanently injurious character not to be remedied by damages (*d*); but where the plaintiff is in possession and seeks to restrain injuries done by one claiming adverse title, the Court was in favour of granting an injunction if there were any ground for it, such as any probable or possible permanent injury to the estate (*e*). This, however, was formerly otherwise (*f*), for the statement by the plaintiff of an adverse title in the defendant immediately put him to an action of trespass and for damages only. The matter will thus be seen on examination to be very perplexed on the law as it stood when this Act came into operation, and in doing away with these perplexities the enactment has been of use.

In addition to the difficulties as to injunctions, similar difficulties arose in the case of appointing receivers. The Court would formerly only appoint a receiver for securing a claim by way of charge in the case that the party applying for it had no legal title to secure him (*g*); thus a mortgagee could have no claim for one, for he might take possession under his mortgage, thus putting himself in a position which L. J. Knight Bruce described as the most pitiable he could conceive. So wherever an annuitant had a legal charge on land on which he could have a distress, no receiver could have been obtained (*h*). Now, however, it is submitted, in any case of this kind where a receiver may be desirable, the Courts have power to grant one.

The difficulties which often arose by reason of the Court of Chancery refusing in any case to interfere immediately in favour of a claimant who claimed under a legal title, which, if good, would give a possessory title (*i*), are of course obviated now, as now the one division of the Court has no preference over another in dealing with legal or equitable rights, each having an equal right to administer both legal and equitable relief in any case. **O. LII., r. 4, Schd. 1**, of Act, 1875, makes provision for the mode in which this power is to be used, which see.

Applications
for injunctions,

Applications for injunction, &c., should be made by motion in Court. The Chief Clerk in Chambers refused to make an order for a receiver and

(*a*) *Mogg v. Mogg*, 2 Dick. 670; *Mortimer v. Cottrell*, 2 Cox, 205; *Best v. Drake*, 11 Ha. 369.

(*b*) *Mitchell v. Dors*, 6 Ves. 147; *Earl Cowper v. Baker*, 17 Ves. 128; *Courthope v. Mapplesden*, 10 Ves. 290; *Hamilton v. Worsefold*, 10 Ves. 290, n.; *London and N. W. Railway Co. v. Lancashire and Yorkshire Railway Co.*, L. R. 4 Eq. 174; *Hervey v. Smith*, 1 K. & J. 389.

(*c*) *Hamilton v. Worsefold*, 10 Ves. 290, n.; *Pilsworth v. Hopton*, 6 Ves. 51; *Jones v. Jones*, 3 Mer. 161; *Haigh v. Jaggard*, 2 Coll. 231; *Smith v. Collier*, 8 Ves. 89; *Davenport v. Davenport*, 7 Ha. 217.

(*d*) *Crockford v. Alexander*, 15 Ves. 138; *Haigh v. Jaggard*, 2 Coll. 231; *Talbot v. Hope-Scott* (1), 4 K. & J. 96; *Neale v. Cripps*, 4 K. & J. 472.

(*e*) Case cited, *Mogg v. Mogg*, 2 Dick. 670; *Robinson v. Lord Byron*, 1 Br. C. C. 588; *Grey v. Duke of Northumberland*, 13 Ves. 236; *Thomas v. Oakley*, 18 Ves. 184; *Lowndes v. Bettle*, V.-C. K., 33 L. J. Ch. 451; 12 W. R. 399; *Stanford v. Hurlston*, L. R. 9 Ch. 116.

(*f*) *Smith v. Collier*, 8 Ves. 89.

(*g*) But see now *Pease v. Fletcher*, quoted in note post (*g*), 1 Ch. D. 273; 45 L. J. Ch. D. 265; 33 L. T. N. S. 644; 24 W. R. 158.

(*h*) *Sollory v. Leaver*, 9 L. R. Eq. 22.

(*i*) See *Slade v. Barlow*, 7 L. R. Eq. 296.

manager under this subsection, on the ground that it was not the practice that he should make such an order except by consent, and the Master of the Rolls observed that he was quite right, and said the practice under O. LII., r. 4, that is, under this subsection, was to apply by motion (a). Where there were two cross motions for a receiver, one order was made on both motions, the plaintiff to have the conduct of the proceedings as his notice of motion had been the earlier served (b).

The Master of the Rolls has held that the words in the commencement of this subsection "interlocutory order of the Court" must be understood as referring to an interlocutory order in a pending action (c). The application for injunction may, in a proper case, be by motion *ex parte*, but in general practice should be by summons on notice (d). The jurisdiction which the Common Law Courts had to grant a mandamus under the Common Law Procedure Act, 1854, s. 68, has been by this subsection extended to the Chancery Division, but only when an action is pending. Therefore, if while the motion for a mandamus has been standing over, a petition for winding up a company has been dismissed, there is no longer any matter pending before the Court in which it can make an order for the issue of the writ (e).

The enactment itself has been illustrated by the authorities following. The words "just and convenient" are so wide, that Mr. Justice Quain at first thought they must be limited in some way, and as no limit is defined, he said they must be limited by former practice, and therefore he refused to grant a receiver where the applicant himself had a legal title to possession (f); but this view does not seem to have found favour generally, for in the case of *Pease v. Fletcher* (g), Vice-Chancellor Bacon extended a receiver to the whole property comprised in the plaintiff's security as to part of which he was legal and as to part equitable mortgagee, though *Habershon v. Gill* (f) was cited in the argument of the case.

It has been held that *prima facie* an injunction or receiver ought not under this power to be granted *ex parte* (h), but yet in cases of emergency it will be so granted, but rarely without hearing both sides. Thus, in a case under special circumstances, a receiver was appointed by Hall, V.-C., on an *ex parte* application by the plaintiff before even the writ was served (i); and in another case, although the indorsement of the writ contained no prayer for injunction or receiver on an *ex parte* motion, the indorsement was amended by the addition of these claims, and an interim injunction granted on the same motion (k). In another case in an action for specific performance of a parol agreement to execute a bill of sale of personal chattels upon an *ex parte* application before the appearance of the defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made by the Court of Appeal appointing the plaintiff without security interim receiver for fourteen days, or until a receiver should be appointed under a reference to Chambers for that purpose which had been directed by the Vice-Chancellor; the plaintiff undertaking to deal with the property only

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&c., to be made by motion in Court.

Cross motions for a receiver.

Meaning of "Interlocutory Order of the Court."

Injunction or receiver, where granted or appointed *ex parte*,

and without security.

(a) *Bull v. Cameron*, 20 S. J. 703.

(b) *Sargant v. Read*, 1 Ch. D. 600; 45 L. J. Ch. D. 206.

(c) *Barr v. Barr*, W. N. 1876, 44; 20 S. J. 272.

(d) *Blewitt v. Dowling*, W. N. 1875, 202; 20 S. J. 55.

(e) *In re Paris Skating Rink Co., Limited* (No. 2), 25 W. R. 767.

(f) *Habershon v. Gill*, W. N. 1875, 231; 20 S. J. 98.

(g) 1 Ch. D. 273; 45 L. J. Ch. D. 265; 33 L. T. N. S. 644; 24 W. R. 158.

(h) *Anon.*, W. N. 1876, 12; 20 S. J. 219.

(i) *Anon.*, 20 S. J. 92; S. C., sub nom. *Re H.'s Estate*, 1 Ch. D. 276; 45 L. J. Ch. D. 749; 24 W. R. 317.

(k) *Colebourne v. Colebourne*, 1 Ch. D. 690; 45 L. J., Ch. D. 749; 24 W. R. 235.

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under the direction of the Court, and to abide by any order the Court might make as to damages or otherwise (*a*). It had just been decided that a receiver has no right to enter until his security is perfected (*b*). So in the case of *Hyde v. Warden*, in an action for specific performance of an agreement to accept a lease of a farm, in which judgment had been given for the defendant, the plaintiff having appealed; the Court of Appeal (no previous application having been made to the Divisional Court or a judge) appointed the plaintiff receiver and manager of the farm without security, on his undertaking to abide by any order the Court might make in the matter (*c*).

Proceedings had been unsuccessfully taken in Chancery to set aside a devise, and thereupon an action had been brought for revocation of probate which was pending. The bank where most of the assets had been deposited had given notice to the plaintiff of their intention to give up the property to the defendant within a week, unless restrained by competent authority. The defendant had been served with the writ in the action by accidentally meeting with the plaintiff's solicitor, for she had no fixed address. Notice of an application by the plaintiff for administration *pendente lite* had been drawn up, but the defendant's solicitor had declined to accept service of the notice. A motion for an *ex parte* injunction against the bank restraining them from parting with the property pending the suit was granted (*d*).

An application was made *ex parte* for an interim injunction in an action on bills of exchange, to restrain the defendant from negotiating a bill obtained without consideration. An order was granted to restrain defendant from parting with bill before judgment or further order, plaintiff undertaking to abide by any order as to damages, and to accept one day's notice of application to discharge the injunction (*e*). Defendant claiming to be the lawful widow of deceased was in possession of his personal estate, and it was alleged by the plaintiff that she had sold a large portion of it; the plaintiff was the father of the deceased, and denied that the defendant was ever married to him, and sought administration as next of kin. After issue of the writ of summons, but before service, he applied *ex parte*, and obtained an order for injunction restraining the defendant from disposing of or removing any of the assets until further order of the Court (*f*).

In several other cases, too, since the passing of the Act, injunctions have been granted *ex parte*, as, to restrain defendant pulling down buildings which he alleged were not according to contract (*g*); from committing certain other trespasses (*h*); from using a steam-engine until trial on applicant's undertaking as to damages (*i*). But, as formerly, an injunction will only be granted where the title to it is clear, and it seems the course from which, on the whole, least injury could be caused in the meantime. So on an application to restrain purchasers of property belonging to defendant in an action on two bills of exchange from paying purchase-money to defendant, the injunction was refused without hesitation (*k*).

(*a*) *Taylor v. Eckersley*, 2 Ch. D. 302; 45 L. J. Ch. D. 527; 34 L. T. N. S. 637; 24 W. R. 450.

(*b*) *Edwards v. Edwards*, 45 L. J. Ch. D. 391; 34 L. T. N. S. 472; 24 W. R. 713; W. N. 1876, 107.

(*c*) 1 Ex. D. 309; 20 S. J. 782.

(*d*) *Melhuish v. Milton*, 20 S. J. 562; 24 W. R. 679.

(*e*) *Anon.*, W. N. 1876, 37; 20 S. J. 261.

(*f*) *Brand v. Mitson*, 45 L. J. P. D. A. 41; 34 L. T. N. S. 854; 24 W. R. 524.

(*g*) *Drake's Patent Concrete Co. v. Dower*, W. N. 1875, 230; 20 S. J. 98.

(*h*) *Fenner v. Bedford*, W. N. 1875, 238; 20 S. J. 120.

(*i*) *Tozer v. Walford*, W. N. 1875, 250; 20 S. J. 140.

(*k*) *Anon.*, W. N. 1876, 8; 20 S. J. 178.

So on an attempt to obtain an order on defendants to pay money into Court, it being shown that the money belonged to the defendants, though the plaintiffs might have a claim against them, the Court immediately refused the order sought (a). So also a claim for an injunction was refused, the plaintiff failing to show that the defendant had not a good right to maintain an obstruction to the plaintiff's lights complained of (b).

So an application for injunction to restrain damages to plaintiff's soil, by the defendant driving heavy carts over it, &c., was refused, the defendant submitting, if verdict be found against him, to allow damages, since action up to date of trial to be assessed (c).

In accordance with the principle hereinbefore mentioned, where the case is not of great urgency, an *ex parte* injunction is refused. Thus on an *ex parte* application to restrain the destruction of grass which was shown to have been already destroyed, Lindley, J., said, "You may serve the defendant with notice if you like, and apply again; but I do not advise that course, as I think you will not get an injunction" (d).

Injunctions have, since the passing of these Acts, been granted on grounds which might formerly have been deemed strange. Thus, in *Nicholas v. Dracachis* (e), deceased having died, as was supposed, intestate, administration had been granted to defendant, in whose name certain shares in a ship were registered late the property of the deceased. A will having been found, the plaintiff and legatee took out administration, and moved for an order restraining any person from dealing with the shares, or from paying over or receiving profits thereof. The order was made, but this seems to have been made in accordance with the statutory power conferred formerly on the Court of Chancery by 17 & 18 Vict. c. 104, s. 65, of making an order on registrar of shipping prohibiting him from allowing dealings on the registry with a ship, or share therein, for the time limited in the order. In the case of *Watts v. Watts* (f), a suit had been instituted by a wife for divorce, and on decree in her favour she had applied under 22 & 23 Vict. c. 61, s. 5, for alteration in the provisions of a postnuptial settlement made by the husband of property of his own, real and personal: the settlement contained a recital that it was made in pursuance of an antenuptial agreement. The application was referred to the Registrar, and before he had made his report, the husband advertised for sale the real property comprised in the settlement, which advertisement the wife sought to enjoin. The Court held that it lay on the husband to prove that the settlement was purely voluntary; the recital was evidence that it was not; and even then it was a question whether after steps taken to alter the settlement, the settlor could sell the property, and they granted an injunction *pendente lite*.

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Injunctions granted since passing of the Acts on grounds somewhat different to those under old practice.

- (9.) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

Damages by collisions at sea. Infants.

(a) *Luscher v. Comptoir d'Escompte de Paris*, W. N. 1875, 200.
 (b) *Anon.*, W. N. 1876, 7; 20 S. J. 162.
 (c) *Makin v. Barrow*, W. N. 1876, 105; 20 S. J. 340.
 (d) *Anon.*, W. N. 1876, 38; 20 S. J. 261.
 (e) 1 P. D. 72; 45 L. J. P. D. A. 45; 24 W. R. 461.
 (f) 24 W. R. 489; 20 S. J. 431.

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§ 25.

(Subs. 9, 10, 11.)

Collision at sea
—Admiralty
rule.

Exceptions.

This subsection introduces, as to collision at sea, the Admiralty rule where both ships are in fault, *i.e.*, the loss is to be apportioned between both ships (*a*). The Common Law rule prevented a plaintiff from recovering anything if his own fault directly tended to the facts of the injury (*b*), or if he might have avoided damage by exercise of ordinary care and skill (*c*), but if the defendant by ordinary care and skill might have prevented the accident, the plaintiff might recover notwithstanding negligence of his own remotely connected with the damage (*d*). The rule of the Court of Admiralty is expressly overruled in particular cases by express enactment, and as to this, it is apprehended this Act makes no distinction where the collision was occasioned by non-observance of any rule, for the exhibition of lights or the use of fog-signals, issued in pursuance of the powers of the statute 17 & 18 Vict. c. 104, or of the rule in the same statute laid down as to the passing of steam and sailing ships, or of the rule there laid down as to a steamship keeping to that side of a narrow channel which lies on the starboard side: the owner of the ship by which such rule was infringed, is not entitled to recover any recompense whatever for any damage sustained by such ship in such collision unless it is shown, to the satisfaction of the Court, that the circumstances of the case made a departure necessary (*e*). The plaintiff, however, might recover, in spite of his negligence on these points, if the collision was not in part caused thereby (*f*). Our maritime law differs from that laid down by some foreign jurists in the case of damage to cargo by collision, for it estimates the injury to both ships and cargoes, and divides the burden between the ships where both are in fault, while the French jurists give no damage in respect of cargo against either ship without proof, which of the two effected the damage, and in the absence of such proof the owner bears his own loss (*g*).

Foreign rule as
to cargoes.

Infants.

(10.) In questions relating to the custody and education of infants the Rules of Equity shall prevail.

Since the passing of this Act the Common Law Divisions have concurrent jurisdiction with the Equity Division in these matters. In the case of *Re Goldsworthy* (*h*), Coleridge, C. J., says, "Not only does the Judicature Act, 1873, by s. 16 confer such jurisdiction upon us, but s. 25, subs. 10, declares in express terms, 'that in questions relating to the 'custody or education of infants, the rules of equity shall prevail.'"

Cases of conflict
not enumerated.

(11.) Generally in all matters not herein-before particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail.

(a) *The Woodrop Sims*, 2 Dods. 83-85.

(b) *Hawkins v. Cooper*, 8 C. & P. 473; *Luxford v. Large*, 5 C. & P. 421; *Vanderplank v. Miller*, M. & M. 169.

(c) *Butterfield v. Forrester*, 11 East, 60; *Sills v. Brown*, 9 C. & P. 601.

(d) *Davies v. Mann*, 10 M. & W. 546; *Dowell v. General Steam Navigation Co.*, 5 E. & B. 195.

(e) 17 & 18 Vict. c. 104, s. 298. See also 25 & 26 Vict. c. 63, s. 29, and 36 & 37 Vict. c. 85, s. 17.

(f) *Morrison v. General Steam Navigation Co.*, 8 Ex. 732; *Dowell v. General Steam Navigation Co.*, 5 E. & B. 195; *Tuff v. Warman*, 2 C. B. N. S. 740; *The Vivid*, 1 Swab. 88, on appeal, 10 Mo. P. C. 472; see *The Telegraph*, 8 Mo. P. C. 167.

(g) 2 Valin, 178, 180; 1 Emérigon, 408, c. 12, s. 14; 4 Boulay-Paty, Droit Com. Marit. t. 12, s. 16, pp. 492-502; Pardessus, 3 Droit Com. No. 652.

(h) 2 Q. B. D. 75.

This subsection is a carrying out in detail the provisions of s. 24. Under this section it has been held on sheriff's interpleader summons, where a claimant produced a bill of sale purporting to pass after-acquired property, following a decision of Lush, J. (a), that the principle of Common Law that such an instrument was void as a transfer of property acquired since its execution was now abrogated, and that the sheriff seized subject to the equities (b). It is possible that this decision, which seems quite correct, might not have been given but for this subsection. See also the case of *Mackley v. Chillingworth* (c). In *Atherley v. Harvey* (d), it was held that even in the practice of discovery the rules of equity are now to prevail, and where interrogatories, which though allowable under the Common Law Procedure Act, 1854 were not such as would have been allowed by the Court of Chancery, had been administered, they were ordered to be struck out.

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(Sub. 11.)

(a) *Anon.*, 20 S. J. 57.

(b) W. N. 1876, 64 ; 20 S. J. 299.

(c) 2 C. P. D. 273 ; 46 L. J. C. P. D. 484 ; 36 L. T. N. S. 514 ; 25 W. R. 650.

(d) 2 Q. B. D. 524 ; 46 L. J. Q. B. D. 518 ; 36 L. T. N. S. 551 ; 25 W. R. 727.

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§ 26.

PART III.

Sittings and Distribution of Business.

Abolition of
terms.

26. The Division of the legal year into terms shall be abolished so far as relates to the administration of justice ; and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any Commissioners to whom any jurisdiction may be assigned under this Act ; but in all other cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority. Subject to Rules of Court, the High Court of Justice and the Court of Appeal, and the Judges thereof respectively, or any such Commissioners as aforesaid, shall have power to sit and act, at any time, and at any place, for the transaction of any part of the business of such Courts respectively, or of such Judges or Commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term.

Rules of Court are the only means of limiting the absolute ubiquity and continual activity of the Courts now subject thereto : the High Court, the Court of Appeal, and the judges thereof respectively, or any such commissioners as aforesaid, shall have power to *sit and act at any time*, and at any place, for the transaction of any part of the business of such Courts respectively, or of such judges or commissioners, &c. As to sittings and vacations, see **O. LXI.**

The time for moving to set aside an award in a voluntary reference depends upon the Acts 9 Wm. 3, c. 15, and 11 Geo. 4 & 1 Wm. 4, c. 70, s. 6. The former provides that any arbitration procured by corruption . . . shall . . . be set aside by any Court of Law or Equity, so as complaint of such corruption be made in the Court where the rule is made for submission before the last day of the next term after such arbitration made or published to the parties. When this Act was passed Easter and Trinity Terms depended on the times of the movable feasts of Easter and Trinity. By 11 Geo. 4, c. 70, s. 6, fixed periods were provided for beginning and end of terms. By the **s. 26** of the present Act terms

are, for judicial purposes, abolished, and it was held in *Christ's College, Brecknock v. Martin* (a) that the time for moving in such case depends on the old Acts, not on the rules under this Act. In this case Cockburn, C. J., says: "I think we cannot interfere with the decision of the Court below. I feel the inconvenience which may in some cases result from the provisions of s. 26 of the Judicature Act, 1873, but it strikes me as being a *casus omissus*, and we cannot cure the defect. The section relates to the ordinary administration of justice, which, with regard to the computation of time, formerly depended upon terms, but now business is regulated by sittings, and power is given to the Supreme Court to make rules for the purpose of carrying out the provisions of the Acts; but this does not give us the power to alter the Act. Terms are now abolished, except for certain special purposes, one of which is the purpose in question here. No such provision as that referred to in s. 26 has been made by any lawful authority, and therefore the term still exists for the purpose of computing the time within which these applications are to be made."

36 & 37 VIC.
c. 66.

§§ 27, 28.

27. Her Majesty in Council may from time to time, upon any report or recommendation of the Judges by whose advice Her Majesty is herein-after authorised to make rules before the commencement of this Act, and after the commencement of this Act upon any report or recommendation of the Council of Judges of the Supreme Court herein-after mentioned, with the consent of the Lord Chancellor, make, revoke, or modify, orders regulating the vacations to be observed by the High Court of Justice and the High Court of Appeal, and in the offices of the said Courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. In the meantime, and subject thereto, the said vacations shall be fixed in the same manner, and by the same authority, as if this Act had not passed. This section shall come into operation immediately upon the passing of this Act.

Vacations.

See 38 & 39
Vict. c. 77,
s. 17.

The rules as to sittings and vacations are contained in O. LXI., Act of 1875, Sched. 1. All such rules are subject to alteration and revision under s. 17 of the Act of 1875, wherein "certain Judges" are defined to refer to the Judges mentioned in the said s. 17, as the Judges on whose recommendation an Order in Council may be made. See note on s. 68.

28. Provision shall be made by Rules of Court for the hearing, in London or Middlesex, during vacation, by Judges of the High Court of Justice and the Court of Appeal

Sittings in
vacation.

(a) W. N. 1877, 132; 46 L. J. (App.) Q. B. D. 591; 36 L. T. N. S. 537; 25 W. R. 637.

36 & 37 VIC.
c. 66.

§ 29.

respectively, of all such applications as may require to be immediately or promptly heard.

§. 28. It has been held that the words in this section "as may require" "to be immediately or promptly heard," apply not only to matters which, from their nature, require prompt hearing, but also to such as require it by reason of the time for their hearing being limited by rules of practice (a). As to Sittings in Vacation, see O. LXI. rr. 5, 6, and 7.

Jurisdiction of
Judges of
High Court on
circuit.

See 39 & 40
Vict. c. 59,
s. 15.

29. Her Majesty, by commission of assize or by any other commission, either general or special, may assign to any Judge or Judges of the High Court of Justice or other persons usually named in commissions of assize, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by Her Majesty shall be of the same validity as if it were enacted in the body of this Act, and any Commissioner or Commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a Court of the said High Court of Justice; and, subject to any restrictions or conditions imposed by Rules of Court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may, with the leave of the Judge or Judges to whom or to whose division the cause or matter is assigned, require the question or issue to be tried and determined by a Commissioner or Commissioners as aforesaid, or at sittings to be held in Middlesex or London as herein-after in this Act mentioned, and such question or issue shall be tried and determined accordingly.

A cause or matter not involving any question or issue of fact may be tried and determined in like manner with the consent of all the parties thereto.

This section keeps alive the powers of issuing commissions of assize and similar commissions, giving power to try issues of fact with juries, which

(a) *Crom v. Samuels*, 2 C. P. D. 21; 46 L. J. C. P. D. 1; 35 L. T. N. S. 423; 25 W. R. 45.

powers are now made exercisable and adaptable in all cases involving the trial of a question or issue of fact, or partly of fact and partly of law, no matter in what division of the Court the cause or matter may be pending, application being made to the Judge or Judges before whom or in whose division the matter is pending, by a party to the matter involving the trial, without which application it would seem the Judge or the divisional Court itself may determine the question though one of fact merely (*a*). It appears, that the object of this section, is to assimilate the hearing of causes in courts of law and in courts of equity; for, on the application of a party, there seems to be the same power in the one Court as in the other to grant a jury, which it would seem ought to be summoned and used in all the Courts in the same way now, *i.e.*, by a commission to a Judge or Commissioners to try the issues of fact (*b*).

A cause or matter not involving any question of fact may be tried now and determined in like manner with the consent of all the parties thereto. The commission of assize is to the commissioner and a jury. The intention in this clause seems to be to deal with the other commissions above-mentioned only, and by consent to allow the judge to refer the whole cause depending on any part or question of it, to a commissioner for determination. See as to jury trials directed by the Chancery Division **O. XXXVI. rr. 27, 29a**, Dec. 1876.

36 & 37 VIC.
c. 66.

§§ 30, 31.

Apparent object of section.

30. Subject to Rules of Court, sittings for the trial by jury of causes and questions or issues of fact shall be held in Middlesex and London, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many Judges as the business to be disposed of may render necessary. Any Judge of the High Court of Justice sitting for the trial of causes and issues in Middlesex or London, at any place heretofore accustomed, or to be hereafter determined by Rules of Court, shall be deemed to constitute a Court of the said High Court of Justice.

Sittings for trial by jury in London and Middlesex.

Subject to Rules of Court, and to vacations which are settled by rules, see **O. LXI.**, jury sittings are held in London and Middlesex during the whole year, by as many judges as are wanted for the purpose. See notes on last foregoing section.

31. For the more convenient despatch of business in the said High Court of Justice (but not so as to prevent any Judge from sitting whenever required in any Divisional Court, or for any Judge of a different Division from his own), there shall be in the said High Court five Divisions consist-

Divisions of the High Court of Justice.

(*a*) See *Garling v. Royds*, 21 S. J. 88.

(*b*) See *Cave v. Mackenzie*, W. N. 1876, 256; 20 S. J. 744; *Clarke v. Cookson*, 2 Ch. D. 746; 45 L. J. Ch. D. 752; 34 L. T. N. S. 646; 24 W. R. 535; *Warner v. Murdock*, 4 Ch. D. 750; 46 L. J. Ch. D. 121; 35 L. T. N. S. 748; 25 W. R. 207; see **O. XXXVI.**, rr. 16, 27, 29, **O. XXXIX.**, r. 1, December, 1876, rr. 4, 5, 6.

36 & 37 VIC.
c. 66.

§ 31.

ing of such number of Judges respectively as herein-after mentioned. Such five Divisions shall respectively include, immediately on the commencement of this Act, the several Judges following; (that is to say,)

- (1.) One Division shall consist of the following Judges; (that is to say,) The Lord Chancellor, who shall be President thereof, the Master of the Rolls, and the Vice-Chancellors of the Court of Chancery, or such of them as shall not be appointed ordinary Judges of the Court of Appeal:
- (2.) One other Division shall consist of the following Judges; (that is to say,) The Lord Chief Justice of England, who shall be President thereof, and such of the other Judges of the Court of Queen's Bench as shall not be appointed ordinary Judges of the Court of Appeal:
- (3.) One other Division shall consist of the following Judges; (that is to say,) The Lord Chief Justice of the Common Pleas, who shall be President thereof, and such of the other Judges of the Court of Common Pleas as shall not be appointed ordinary Judges of the Court of Appeal:
- (4.) One other Division shall consist of the following Judges; (that is to say,) The Lord Chief Baron of the Exchequer, who shall be President thereof, and such of the other Barons of the Court of Exchequer as shall not be appointed ordinary Judges of the Court of Appeal:
- (5.) One other Division shall consist of two Judges who, immediately on the commencement of this Act, shall be the existing Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes and the existing Judge of the High Court of Admiralty, unless either of them is appointed an ordinary Judge to the Court of Appeal. The existing Judge of the Court of Probate shall (unless so appointed) be the President of the said Division, and subject thereto the Senior Judge of the said Division, according to the order of Precedence under this Act, shall be President.

The said five Divisions shall be called respectively the Chancery Division, the Queen's Bench Division, the Common

Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division.

36 & 37 VIC.
c. 66.

§ 31, 32.

Any deficiency of the number of five Judges for constituting, in manner aforesaid, immediately on the commencement of this Act, any one or more of the Queen's Bench, Common Pleas, and Exchequer Divisions, may be supplied by the appointment, under Her Majesty's Royal Sign Manual, either before or after the time fixed for the commencement of this Act, of one of the Puisne Justices or Junior Barons of any superior Court of Common Law from which no Judge may be so appointed as aforesaid to the Court of Appeal, to be a Judge of any Division in which such deficiency would otherwise exist. And any deficiency of the number of three Vice-Chancellors or of the two Judges of the Probate and Admiralty Divisions at the time of the commencement of this Act may be supplied by the appointment of a new Judge in his place in the same manner as if a vacancy in such office had occurred after the commencement of this Act.

Any Judge of any of the said Divisions may be transferred by Her Majesty, under Her Royal Sign Manual, from one to another of the said Divisions.

Upon any vacancy happening among the Judges of the said High Court, the Judge appointed to fill such vacancy shall, subject to the provisions of this Act, and to any Rules of Court which may be made pursuant thereto, become a member of the same Division to which the Judge whose place has become vacant belonged.

This section along with s. 34 appears to nullify the intended unification of the courts, and there really seems no good reason why the High Court of Justice should be divided into five divisions, though there is much to be said for three,—a general court of contest, including the three old Common Law Courts, a Court of General Administration, comprising the Chancery Court, and the Court of Admiralty, Probate, and Divorce, if they are to remain one Division.

32. Her Majesty in Council may from time to time, upon any report or recommendation of the Council of Judges of the Supreme Court herein-after mentioned, order that any reduction or increase in the number of Divisions of the High Court of Justice, or in the number of the Judges of the said High Court who may be attached to any such Division, may, pursuant to such report or recommendation, be carried into effect; and may give all such further directions as may be

Power to alter
Divisions by
Order in
Council.

36 & 37 VIC.
c. 66.

§§ 32, 33.

necessary or proper for that purpose ; and such Order may provide for the abolition on vacancy of the distinction of the offices of any of the following Judges, namely, the Chief Justice of England, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, which may be reduced, and of the salaries, pensions, and patronage attached to such offices, from the offices of the other Judges of the High Court of Justice, notwithstanding anything in this Act relating to the countenance of such offices, salaries, pensions, and patronage ; but no such Order of Her Majesty in Council shall come into operation until the same shall have been laid before each House of Parliament for thirty days on which that House shall have sat, nor if, within such period of thirty days, an address is presented to Her Majesty by either House of Parliament, praying that the same may not come into operation. Any such Order, in respect whereof no such address shall have been presented to Her Majesty, shall, from and after the expiration of such period of thirty days, be of the same force and effect as if it had been herein expressly enacted : Provided always, that the total number of the Judges of the Supreme Court shall not be reduced or increased by any such Order.

In this section power is left to the Queen in Council upon the report or recommendation of the Council of Judges obtained upon the consent of both Houses of Parliament as in the section provided, to vary either by reducing or enlarging the number of divisions, or the number of judges in any division, and on vacancy to abolish the distinction of the offices of Lord Chief Justice, Master of the Rolls, Chief Justice of the Common Pleas, and Chief Baron, from those of the other Judges, and to reduce the salaries, patronage, and pensions of these offices, but no such order shall alter the entire number of Judges in the Supreme Court.

Rules of Court
to provide for
distribution of
business.

33. All causes and matters which may be commenced in, or which shall be transferred by this Act to, the High Court of Justice, shall be distributed among the several Divisions and Judges of the said High Court, in such manner as may from time to time be determined by any Rules of Court, or Orders of Transfer, to be made under the authority of this Act ; and in the meantime, and subject thereto, all such causes and matters shall be assigned to the said Divisions respectively, in the manner herein-after provided. Every document by which any cause or matter may be commenced in the said High Court shall be marked with the name of

the Division, or with the name of the Judge, to which or to whom the same is assigned.

36 & 37 VIC.
c. 66.

§ 34.

Practically business under this clause is to be arranged much in the same way as that of Chancery was formerly distributed, so far as not governed by Rules of Court.

As to distribution of business and option in choice of division, see next section, and s. 42, and Act of 1875, s. 11, and O. V. r. 4.

34. There shall be assigned (subject as aforesaid) to the Chancery Division of the said Court :

Assignment of certain business to particular Divisions of High Court, subject to Rules.

(1.) All causes and matters pending in the Court of Chancery at the commencement of this Act :

(2.) All causes and matters to be commenced after the commencement of this Act, under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery, or to any Judges or Judge thereof respectively, except Appeals from County Courts :

(3.) All causes and matters for any of the following purposes :

The administration of the estates of deceased persons ;

The dissolution of partnerships or the taking of partnership or other accounts ;

The redemption or foreclosure of mortgages ;

The raising of portions, or other charges on land ;

The sale and distribution of the proceeds of property subject to any lien or charge ;

The execution of trusts, charitable or private ;

The rectification, or setting aside, or cancellation of deeds or other written instruments ;

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases ;

The partition or sale of real estates ;

The wardship of infants and the care of infants' estates.

These assignments do not seem to be imperative but directory merely, and in some cases are not absolutely followed in principle : thus, an application to transfer an action in which was a counter-claim for a partnership account to the Chancery Division was refused, as the account did not seem to be involved (a). With regard to "the execution of

(a) *Warne v. Dell*, W. N. 1875, 259 ; 20 S. J. 160.

36 & 37 VIC.
c. 66.

§ 34.

trusts," see *ante*, p. 24 (a); *Anon.* (b); "rectification of deeds," *Mostyn v. West Mostyn Coal and Iron Co., Limited* (a); *Breslauer v. Barwick* (c); *Padwick v. Scott* (d); from which cases it appears that where the object or one main object in the suit is to execute the trusts, or to rectify the deed, &c., the transfer will be ordered; but where the existence of the trusts or the rectification of the instrument is only a condition for the argument or the relief prayed, then in most cases it will be assumed for the purpose of the argument to be done, and the transfer will not be effected for the purpose of the determination of the argument. The same principle is confirmed in *Holmes v. Harvey* (e), where, an action for breach of agreement and fraudulent misrepresentation of value of business having been brought in the Exchequer Division, a cross-suit was instituted in the Chancery Division for specific performance of the agreement; after issue joined in both causes an application was made to Judge in Chambers for transfer of the Exchequer Division cause to the Chancery Division, which application was refused by the Judge, as he thought a jury ought to try the case. On appeal this was held no good ground for the refusal, and that the order should have been made, as there was an actual claim for specific performance as to which the jurisdiction was specially reserved for the Chancery Division.

There shall be assigned (subject as aforesaid) to the Queen's Bench Division of the said Court:

- (1.) All causes and matters, civil and criminal, pending in the Court of Queen's Bench at the commencement of this Act:
- (2.) All causes and matters, civil and criminal, which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction, if this Act had not passed.

Appeals, however, from Quarter Sessions, under 12 & 13 Vict. c. 45, s. 11, are notwithstanding this provision removed to the new Court of Appeal from inferior Courts under s. 45, *post* (f). Applications for a rule calling on justices to show cause why a case should not be stated under 20 & 21 Vict. c. 43, should be made to Queen's Bench Division and not to Court under s. 45 (g).

There shall be assigned (subject as aforesaid) to the Common Pleas Division of the said Court:

- (1.) All causes and matters pending in the Court of

(a) *Mostyn v. Mostyn Coal and Iron Co.*, 1 C. P. D. 145; 46 L. J. C. P. D. 401; 34 L. T. N. S. 325; 24 W. R. 401.

(b) W. N. 1876, 106; 20 S. J. 342.

(c) (P. 24), 20 S. J. 663; 24 W. R. 901, and *post*, p. 258.

(d) (P. 24), W. N. 1876, 74; 20 S. J. 299, 320.

(e) W. N. 1876, 276; 25 W. R. 80; 35 L. T. N. S. 600; see also *Holloway v. York*, 2 Ex. D. 333; 21 S. J. 360; 25 W. R. 403.

(f) *Dutton v. Halse*, 20 S. J. 232.

(g) *Re Ellershaw, Ex parte Longbottom*, 1 Q. B. D. 481.

Common Pleas at Westminster, the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham, respectively, at the commencement of this Act:

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c. 66.

§ 34.

- (2.) All causes and matters which would have been within the exclusive cognisance of the Court of Common Pleas at Westminster, if this Act had not passed.

There shall be assigned (subject as aforesaid) to the Exchequer Division of the said Court:

- (1.) All causes and matters pending in the Court of Exchequer at the commencement of this Act:

- (2.) All causes and matters which would have been within the exclusive cognizance of the Court of Exchequer either as a Court of Revenue or as a Common Law Court if this Act had not passed:

- (3.) } *Subjects 3 & 4 repealed by 38 & 39 Vict. c. 77, s. 33,* Bankruptcy
(4.) } *and Sched. 2. See also same Act, s. 9.* matters.

There shall be assigned (subject as aforesaid) to the Probate, Divorce, and Admiralty Division of the said High Court:

- (1.) All causes and matters pending in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, at the commencement of this Act:

- (2.) All causes and matters which would have been within the exclusive cognizance of the Court of Probate, or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty, if this Act had not passed.

The object of this clause seems to be in consonance with the intention of universalizing the doctrines of equity wherever they varied from the doctrines of common law, to preserve all business in the Courts in which it was likely to have taken place formerly. It has with this view preserved to Chancery most of its general heads of jurisdiction. To the other Courts all their special jurisdictions, and to all the Courts all the jurisdiction over all cases already introduced into them respectively at the time of the Act coming into effect. The Queen's Bench used formerly to have some jurisdictions which it has now lost; but it still has an exclusive jurisdiction over inferior jurisdictions, and may either remove their proceedings to be determined by itself, or prohibit their proceeding. It has a control over all civil corporations in the kingdom, and supervises magistrates, and has a general criminal jurisdiction. The Court of Common Pleas had not for long exercised a large exclusive jurisdiction so far as is known; but it always held exclusive jurisdiction as to real actions and writs of right, which long ago were perhaps the most important of legal

Preserves jurisdiction of existing Courts.

Jurisdiction of Queen's Bench.

36 & 37 VIC.
c. 66.

§ 35.

Of Common
Pleas.

Of Exchequer.

Of Probate,
&c.

questions. All these but three, viz., Writ of Dower unde nil habet, Writ of Right of Dower, and Quare Impedit, were abolished absolutely by 3 & 4 Wm. 4, c. 27, s. 36 (the Statute of Limitations), and these three, with the plaint for Freebench or Dower in regard to copyhold lands which had been kept alive along with them, were abolished by 23 & 24 Vict. c. 126, s. 26 (the Common Law Procedure Act, 1860), and personal actions substituted for them; but these were still retained in the Common Pleas, to which division they are still peculiar. The Common Pleas Division continues to be the Court appointed for appeals from the decision of revising barristers as to the registration of electors: see 6 Vict. c. 18, s. 60, since which this enactment has not been changed. As to the Court of Exchequer, it was originally, and the Exchequer Division is still a Court of Revenue; but out of this its common law as well as its former equity jurisdiction arose, and we never knew of any exclusive jurisdiction possessed by it except as a Court of Revenue, in which its peculiar jurisdiction is still maintained. The grant to it of Bankruptcy jurisdiction made by the Act of 1873, has been repealed by the Act of 1875, as before remarked, s. 9. The jurisdiction of the Probate, Admiralty, and Divorce Division will be the same as that formerly held by the three Courts of the same name or names. See notes to s. 36, *post*, pp. 61, 62.

Admiralty Appeals from County Courts seem still retained by the Admiralty Division notwithstanding s. 45, which see (a).

Option for any
plaintiff (sub-
ject to rules)
to choose in
what Division
he will sue.

Provision of
Act of 1875 as
to option for
any plaintiff
(subject to
Rules) to choose
in what divi-
sion he will
sue.

See note, s. 11,
Act of 1875,
post, p. 114.

35. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*
See also same Act, s. 11.

This section is altogether repealed by Act of 1875, s. 33 and Sched. II., and in lieu thereof seems to be substituted s. 11, which is as follows:—

“ Subject to any Rules of Court and to the provisions of the principal Act,
“ and this Act, and to the power of transfer, every person by whom any
“ cause or matter may be commenced in the said High Court of Justice
“ shall assign such cause or matter to one of the Divisions of the High Court
“ as he may think fit by marking the document by which the same is
“ commenced with the name of such Division, and giving notice thereof
“ to the proper officer of the Court: Provided that

“ 1. All interlocutory and other steps and proceedings in or before the
“ said High Court in any cause or matter subsequent to the commencement
“ thereof, shall be taken (subject to any Rules of Court and to the power
“ of transfer) in the Division of the said High Court to which such cause
“ or matter is for the time being attached; and

“ 2. If any plaintiff or petitioner shall at any time assign his cause or
“ matter to any Division of the said High Court to which, according to
“ the Rules of Court or the provisions of the principal Act, or this Act, the
“ same ought not to be assigned, the Court, or any Judge of such Division,
“ upon being informed thereof, may, on a summary application at any
“ stage of the cause or matter, direct the same to be transferred to the
“ Division of the said Court to which, according to such rules or provisions,
“ the same ought to have been assigned, or he may, if he think it expedient
“ so to do, retain the same in the Division in which the same was com-
“ menced; and all steps and proceedings whatsoever taken by the plaintiff
“ or petitioner or by any other party in any such cause or matter, and all

(a) *The Two Brothers*, 1 P. D. 52; 45 L. J. P. D. A. 47; 33 L. T. N. S. 792; 24 W. R. 112; see also O. LVIII. r. 19, Dec. 1876.

"orders made therein by the Court or any Judge thereof before any such transfer, shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper Division of the said Court to which such cause or matter ought to have been assigned; and

"3. Subject to Rules of Court, a person commencing any cause or matter shall not assign the same to the Probate, Divorce, and Admiralty Division unless he would have been entitled to commence the same in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty if this Act had not passed."

This clause, it will be seen, differs only from that which has been repealed in some slight particulars with reference to the Probate, Divorce, and Admiralty Divisions as to which the form of the clause repealed, but for the Rules of Court to which it gave sanction, would have taken away all jurisdiction from the Admiralty Division in those cases in which the Court of Admiralty has concurrent jurisdiction with the Common Law Courts. The Rules of Court, however, would, under the power given them, have restored this jurisdiction, even if the clause had not been repealed and the present clause been substituted. See *O. V.*, r. 4. Notice to the proper officer of the Court is provided for by *O. V.*, r. 9.

The case of *Pacey and Wife v. The London Tramway Co.* (a) shows the importance sometimes of the Division to which a cause is assigned. It was an action for compensation for injury which had been brought in the Exchequer Division: an appeal had been brought from an order of Pollock, B., at Chambers, who had refused inspection of the report of a surgeon of the defendants who had seen the injured plaintiff. On matters of this kind, it will be seen (b), that there had been a conflict between the Court of Exchequer and the Common Pleas on the one hand and The Queen's Bench which followed the Rule in Chancery on the other. Cockburn, C. J., said, that as this was a cause in the Exchequer Division they were bound to follow the rule on this subject laid down by the Judges in that Division, and the Court dismissed the application, intimating that the proper course was to go to the Court of Appeal. In this case the Lord Chief Justice said it was desirable that in the list of causes it should be stated to which Division causes respectively belonged.

36. Any cause or matter may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by such authority and in such manner as Rules of Court may direct, from one Division or Judge of the High Court of Justice to any other Division or Judge thereof, or may by the like authority be retained in the Division in which the same was commenced, although such may not be the proper Division to which the same cause or matter ought, in the first instance, to have been assigned.

It does not seem to require any application from any party to a cause to get it sent to the proper division; if wrongly entered at first it may be done by such authority and in such manner as the Rules direct.

36 & 37 VIC.
c. 66.

§ 36.

Form of clause repealed, but for Rules of Court would have destroyed jurisdiction of fifth Division in cases where it had concurrent jurisdiction. Rules restored it.

Power of transfer.

Application of party not necessary to remit cases to proper Division.

(a) 20 S. J. 412.

(b) Notes on *O. XXXI.*

36 & 37 VIC.
c. 66.

§ 37.

Grounds for
transfer.

Judge at
Chambers
power to order.

Sittings in
London and
Middlesex and
on Circuits.

Amended, 38 &
39 *Vict. c.* 77,
s. 8.

See also 39 &
40 *Vict. c.* 59,
s. 15.

In any case the usual way in which causes have been transferred since the Acts came in force, has been by application of some party in the cause and such cases are by no means uncommon. We have already in the notes on s. 34, p. 58, noticed several cases of attempts to transfer actions from one Division to another, some successful, some not. We may further instance the following (a): In an Anon. case an action had been brought on a guarantee against a married woman; leave had been obtained to amend indorsement so as to claim to charge her separate estate, and it was now sought to transfer the action to the Chancery Division: the application was allowed, costs up to transfer to be dealt with by the Vice-Chancellor (b). Consent of parties is not by itself a sufficient reason for transferring a cause, and it will not be transferred on the ground that another suit remotely connected with it is in another Division, but if the same matters are to be at issue in another cause in another Division, that may be ground for transfer (c). Further as to transfer, see Act of 1875, s. 11, and O. LI. In *Holloway v. York* (d), an action was commenced in the Exchequer Division to rescind a contract for the sale and purchase of land, and to recover the deposit paid to the vendor, on the ground that the vendor had failed to make out title according to the contract. On the application of the vendor, who had filed a counter-claim for specific performance, the Court of Appeal ordered transfer of the cause to the Chancery Division. In *Hillman v. Mayhew* (e) it was held that a Judge at Chambers of any Common Law Division has jurisdiction under s. 39 and O. LIV., r. 2, which see, to transfer causes from any such Division, though not his own, to the Chancery Division.

37. Subject to any arrangements which may be from time to time made by mutual agreement between the Judges of the said High Court, the sittings for trials by jury in London and Middlesex, and the sittings of Judges of the said High Court under Commissions of Assize, Oyer and Terminer, and Gaol Delivery, shall be held by or before Judges of the Queen's Bench, Common Pleas, or Exchequer Division of the said High Court: provided that it shall be lawful for Her Majesty, if she shall think fit, to include in any such Commission any Ordinary Judge of the Court of Appeal or any Judge of the Chancery Division to be appointed after the commencement of this Act or any Serjeant-at-Law, or any of Her Majesty's Counsel learned in the Law, who, for the purposes of such Commission, shall have all the power, authority, and jurisdiction of a Judge of the said High Court.

This clause provides that the Judges already appointed shall not be made subject to a quantity and quality of work which they did not contemplate when they took their appointments, and provides that the circuit

(a) *Johnson v. Moffat*, W. N. 1876, 21; 20 S. J. 240.

(b) *Anon.*, W. N. 1876, 22; 20 S. J. 242.

(c) *Anon.*, W. N. 1876, 55; 20 S. J. 282.

(d) 2 Ex. D. 333; 25 W. R. 403; 21 S. J. 360.

(e) 1 Ex. D. 132; 45 L. J. Ex. D. 334; 34 L. T. N. S. 256; 24 W. R. 435.

work and sitting with juries shall at first be confined to those whose duty it has been hitherto; but it provides that any Judge to be appointed in future, though a Chancery or Appellate Judge, may be commissioned to sit with a jury or any Serjeant or Q.C.

36 & 37 VIC.
c. 66.

§§ 38, 39.

S. 8 of Act of 1875 further contains an amendment to this clause as follows:—"Every Judge of the Probate, Divorce, and Admiralty Division of the said High Court of Justice appointed after the passing of this Act shall, so far as the state of business in the said Division will admit, share with the Judges mentioned in s. 37 of the principal Act, the duty of holding sittings for trials by jury in London and Middlesex, and sittings under Commissions of Assize, Nisi Prius, Oyer and Terminer, and Gaol Delivery." See notes on s. 29.

Future Judges of fifth Division to share jury business under commission.

38. The Judges to be placed on the rota for the trial of election petitions for England in each year, under the provisions of the "Parliamentary Elections Act, 1868," shall be selected out of the Judges of the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice in such manner as may be provided by any Rules of Court to be made for that purpose; and in the meantime, and subject thereto, shall be selected out of the Judges of the said Queen's Bench, Common Pleas, and Exchequer Divisions of the said High Court, by the Judges of such Divisions respectively, as if such Divisions had been named instead of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively, in such last-mentioned Act: Provided that the Judges who, at the commencement of this Act, shall be upon the rota for the trial of such petitions during the then current year, shall continue upon such rota until the end of such year, in the same manner as if this Act had not passed.

Rota of Judges for election petitions.

Here also the duty of trying election petitions is confined to the Judges of those Divisions representing the Courts whose Judges were subject to the duty at the time the Act came into operation, subject to rules of Court; but no provision is made for Judges of any other Divisions being in future rendered liable to these duties.

39. Any Judge of the said High Court of Justice may, subject to any Rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in Chambers respectively, by a single Judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorised to be so heard by any Rules of Court to be hereafter made. In

Powers of one or more Judges not constituting a Divisional Court.

36 & 37 VIC.
c. 66.

§ 41.

all such cases, any Judge sitting in Court shall be deemed to constitute a Court.

See with regard to this section the remarks of Mellish, L. J., in *Maclean v. Vaughan* (a), see also *Hillman v. Mayhew* (b), where it was held that a Judge of any Common Law Division sitting at Chambers may transfer causes from any such division, whether his own or not, to Chancery Division. For Rules as to the practice on this section, see **O. LIV.** This section does not touch the power of a Judge to make any order as to costs on application at trial under **O. LV.**, which see; and if application be not made *at trial*, in such case jurisdiction is gone (c).

Divisional
Courts of the
High Court of
Justice.

*Repealed in
part by 39 &
40 Vict. c. 59,
s. 17, which
see.*

40. Such causes and matters as are not proper to be heard by a single Judge shall be heard by Divisional Courts of the said High Court of Justice, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court. Any number of such Divisional Courts may sit at the same time. A Divisional Court of the said High Court of Justice shall be constituted by two or three, and no more of the Judges thereof; and, except when through pressure of business or any other cause it may not conveniently be found practicable, shall be composed of three such Judges. Every Judge of the said High Court shall be qualified and empowered to sit in any of such Divisional Courts. The President of every such Divisional Court of the High Court of Justice shall be the senior Judge of those present, according to the order of their precedence under this Act.

Elasticity of
new arrange-
ment.

These arrangements may give great elasticity and convenience to the Court: wherever it may be desirable to have more than one Judge to hear a matter, it can be heard by a Divisional Court of two or three Judges, and a number of such Divisional Courts may sit at the same time. The section is, however, modified as in the margin is noted, and by **O. LVIIa.**

Divisional
Courts for
business of
Queen's Bench,
Common Pleas,
and Exchequer
Divisions.

*Repealed in
part by 39 &
40 Vict. c. 59,*

41. Subject to any Rules of Court, and in the meantime until such Rules shall be made, all business belonging to the Queen's Bench, Common Pleas, and Exchequer Divisions respectively of the said High Court, which, according to the practice now existing in the Superior Courts of Common Law, would have been proper to be transacted or disposed of by the Court sitting in Banc, if this Act had not passed,

(a) 20 S. J. 723.

(b) 1 Ex. D. 132; 45 L. J. Ex. D. 334; 34 L. T. N. S. 256; 24 W. R. 435.

(c) *Baker v. Oakes*, 2 Q. B. D. 171; 46 L. J. Q. B. D. 246; 35 L. T. N. S. 671, 832; 25 W. R. 220; see cases cited under **O. LV.**

may be transacted and disposed of by Divisional Courts, which shall, as far as may be found practicable and convenient, include one or more Judge or Judges attached to the particular Division of the said Court to which the cause or matter out of which such business arises has been assigned; and it shall be the duty of every Judge of such last-mentioned Division, and also of every other Judge of the High Court who shall not for the time being be occupied in the transaction of any business specially assigned to him, or in the business of any other Divisional Court, to take part, if required, in the sittings of such Divisional Courts as may from time to time be necessary for the transaction of the business assigned to the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively; and all such arrangements as may be necessary or proper for that purpose, or for constituting or holding any Divisional Courts of the said High Court of Justice for any other purpose authorised by this Act, and also for the proper transaction of that part of the business of the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively, which ought to be transacted by one or more Judges not sitting in a Divisional Court, shall be made from time to time under the direction and superintendence of the Judges of the said High Court; and in case of difference among them, in such manner as a majority of the said Judges, with the concurrence of the Lord Chief Justice of England, shall determine.

Under the new enactment business is ordered to be carried on for the most part before single Judges, but Divisional Courts are appointed to try particular classes of questions by **O. LVIIa.**, r. 1, which see.

42. Subject to any Rules of Court, and in the meantime until such rules shall be made, all business arising out of any cause or matter assigned to the Chancery or Probate, Divorce, and Admiralty Division of the said High Court shall be transacted and disposed of in the first instance by one Judge only, as has been heretofore accustomed in the Court of Chancery, the Court of Probate and for Divorce and Matrimonial Causes, and the High Court of Admiralty respectively; and every cause or matter which, at the commencement of this Act, may be depending in the Court of Chancery, the Court of Probate and for Divorce and Matrimonial Causes, and the High Court of Admiralty respectively; shall (subject to the power of transfer) be assigned to the

36 & 37 VIC.
c. 66.

§§ 41, 42.

s. 17, which
see. See also
O. LVIIa.

Distribution of
business among
the Judges of
the Chancery
and Probate,
Divorce, and
Admiralty
Divisions of the
High Court.

Repealed in
part by 39 &
40 Vict. c. 59,
s. 17, which
see.

36 & 37 VIC.
c. 66.

§§ 42-44.

same Judge in or to whose Court the same may have been depending or attached at the commencement of this Act; and every cause or matter which after the commencement of this Act may be commenced in the Chancery Division of the said High Court shall be assigned to one of the Judges thereof, by marking the same with the name of such of the said Judges as the plaintiff or petitioner (subject to the power of transfer) may in his option think fit: Provided that (subject to any Rules of Court, and to the power of transfer, and to the provisions of this Act as to trial of questions or issues by Commissioners, or in Middlesex or London,) all causes and matters which if this Act had not passed, would have been within the exclusive cognizance of the High Court of Admiralty, shall be assigned to the present Judge of the said Admiralty Court during his continuance in office as a Judge of the High Court.

Fifth division
in reality two
divisions at
least.

See s. 33, ante,
p. 56.

This section provides for the distribution of the Chancery, Probate, Divorce, and Admiralty, and whereas by the 31st and 34th sections the Probate, Divorce, and Admiralty, were made one division by this section, it is in fact made two, and the Judge of the Admiralty Court is made an exclusive Judge still of all Admiralty matters, but only during his individual continuance as a Judge, and subject to Rules of Court, the power of transfer, and the provisions as to trial of issues by a Commissioner in Middlesex or London. With regard to the power of the Admiralty Division on appeals from Admiralty cases in County Courts, see *The Two Brothers* (a).

Divisional
Courts for
business of the
Chancery
Division.

Repealed in
part by 39 & 40
Vict. c. 59,
s. 17, which
see.

43. Divisional Courts may be held for the transaction of any part of the business assigned to the said Chancery Division, which the Judge, to whom such business is assigned, with the concurrence of the President of the same Division, deems proper to be heard by a Divisional Court.

Provision is here made for the hearing of Chancery matters by a Divisional Court, which was not possible heretofore, whenever the Judge to whom the cause is referred, and the president of the division agree in assigning it to a Divisional Court.

Divisional
Courts for
business
belonging to
the (fifth)
Division.

44. Divisional Courts may be held for the transaction of any part of the business assigned to the Probate, Divorce, and Admiralty Division of the said High Court, which the Judges of such Division, with the concurrence of the President of the said High Court, deem proper to be heard by a Divisional

(a) See ante, note, s. 34, p. 60; 1 P. D. 52; 45 L. J. P. D. A. 47; 33 L. T. N. S. 792; 24 W. R. 112.

Court. Any cause or matter assigned to the said Probate, Divorce, and Admiralty Division may be heard at the request of the President of such Division, with the concurrence of the President of the said High Court, by any other Judge of the said High Court.

36 & 37 VIC.
c. 66.

§§ 44, 45.

Repealed in part by 39 & 40 Vict. c. 59, s. 17, which see.

See with regard to this section cases before cited, *Westhead v. Westhead* (a); *Wallis v. Wallis* (b); *Gladstone v. Gladstone* (c); *Robinson v. Robinson* (d).

45. All Appeals from Petty or Quarter Sessions, from a County Court, or from any other inferior Court, which might before the passing of this Act have been brought to any Court or Judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the said High Court of Justice, consisting respectively of such of the Judges thereof as may from time to time be assigned for that purpose, pursuant to Rules of Court, or (subject to Rules of Court) as may be so assigned according to arrangements made for the purpose by the Judges of the said High Court. The determination of such Appeals respectively by such Divisional Courts shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard.

Appeals from inferior Courts to be determined by Divisional Courts.

See O. LVIII. r. 19.

For a considerable time after the passing of the Acts, matters under this section were left in the greatest confusion by reason of no Court having been constituted thereunder to hear the appeals accruing from the various inferior Courts, and a great diversity of orders were made in consequence. In *Eccles v. Eccles* (e), V.-C. Malins, as Judge of a superior Court under 38 & 39 Vict. c. 50, s. 6, made an order overruling the order of the Judge of a County Court unless cause were shown within one month. In *Amiss v. Clark* (f), Lush, J., made an order that the defendant appealing might, on motion *ex parte*, be allowed to appeal to the proper Divisional Court when constituted, and time being just expired, he extended the time for appeal for eight days afterwards; being applied to (g) again to extend the time, gave two days further in order that application might be made for the formation of a Divisional Court. Vice-Chancellor Malins was then applied to (h), who doubted whether he had any power to take steps for the formation of such a Court, but extended the time further for a fort-

Applications made before the constitution of the Court.

(a) 2 P. D. 1; 46 L. J. P. D. A. 32; 25 W. R. 35.

(b) *Ante*, p. 17, 2 P. D. 141; 36 L. T. N. S. 161; 25 W. R. 387.

(c) 2 P. D. 143; 25 W. R. 387.

(d) 2 P. D. 77; 36 L. T. N. S. 122; 25 W. R. 388.

(e) 33 L. T. N. S. 338; 24 W. R. 39; W. N. 1875, 194.

(f) W. N. 1875, 203; 20 S. J. 56.

(g) W. N. 1875, 229; 20 S. J. 97.

(h) W. N. 1875, 210.

36 & 37 VIC.
c. 66.

§ 45.

Constitution
of Court.

From what
inferior Courts
an appeal lies
under this sect.

night. Application was made next to Quain, J., in Chambers, after, it seems, a fruitless application had in the interval been made to the Court or full Division, and he refused to follow the course taken in *Eccles v. Eccles* (a), but granted a rule *nisi* calling on the plaintiff to show cause before a Judge in Chambers why the decision should not be reversed, on which rule the case was finally heard and the decision reversed (b). An application in another case for a rule calling on the opposite side to show cause why the decision of a County Court Judge should not be reversed was refused, as the decision of the County Court seemed to be correct (c). But in the case of *Hurst & Son v. Lloyd* (d) on an *ex parte* application before a Judge in Chambers for a new trial before County Court Judge, a rule *nisi* was granted to show cause before Divisional Court when appointed, and on an application to Quain, J., for extension of time for appeal from County Court, the Judge is reported to have said to the applicant's counsel, "You might have applied to me at once for a rule *nisi*, but I will grant the "extension of time you ask" (e). In *Norton Iron Company v. Birmingham* (f) judgment had been given in County Court for plaintiff for £30; the defendant wished to appeal, and application was made to the Vice-Chancellor for an order staying execution pending an appeal. The Vice-Chancellor refused an *ex parte* order, but gave leave to give notice of motion, the defendant paying into Court £30 and costs, and stayed execution till the hearing of the motion. The Court contemplated by this section was created by O. LVIII., r. 19, published among the rules of Dec., 1875, which has since been annulled, and a rule, published Dec., 1876, substituted, (which see). After the Court was appointed, but before any orders were settled for its practice, it was determined that the appellant might either make a substantive application at Chambers under the new County Courts Act, or might obtain from a Judge at Chambers an order for extension of time and make his motion before the new Divisional Court of Appeal as soon as it should be in session (g), and the latter course was that followed in *Billing v. Nicholson* (h). In *Hill v. Persee* (i) an application was made to Archibald, J., to make a similar order, who at first doubted if he had power, as the appeal was statutory, but considering that he had himself power to hear the appeal at that time, made the order required, treating the application as a first hearing of a motion for a rule *nisi*. The section does not, it seems, apply to Admiralty appeals from inferior Courts, which, until further order, are to be assigned to the Admiralty Division; see notes to s. 34 and to s. 42, ante (k). Appeals under 12 & 13 Vict. c. 45, s. 11, from Quarter Sessions (l), are, it seems to be held, under this s. 45, not under s. 34, to the Queen's Bench Division; see note on s. 34. An application for a rule calling on Justices to show cause why a case should not be stated under 20 & 21 Vict. c. 43, should be made to Q. B. Division, and not to this Court (m).

Appeal from the Lord Mayor's Court does not lie to this Court, but to

(a) 33 L. T. N. S. 338; 24 W. R. 39; W. N. 1875, 194.

(b) W. N. 1876, 8; 20 S. J. 177.

(c) *Anon.*, W. N. 1875, 237; 20 S. J. 102.

(d) W. N. 1876, 7; 20 S. J. 162.

(e) *Anon.*, W. N. 1876, 9; 20 S. J. 178.

(f) 20 S. J. 152.

(g) *Anon.*, 20 S. J. 232. See now Order of February, 1877, as to appeals from County Courts.

(h) W. N. 1876, 38; 20 S. J. 259.

(i) W. N. 1876, 54; 20 S. J. 280.

(k) *The Two Brothers*, 1 P. D. 52; 45 L. J. P. D. A. 47; 33 L. T. N. S. 792; 24 W. R. 112.

(l) *Dutton v. Halse*, 20 S. J. 232.

(m) *Re Ellershaw, Ex parte Longbottom*, 1 Q. B. D. 481.

the Court of Appeal (a); see s. 18, subs. 4. Nor does any appeal, it would seem, lie from the Judge of a County Court on question of fact heard by him without a jury (b).

Any application to take a case from the Divisional Court of Appeal on further appeal to the Court of Appeal under the last paragraph in the section must be made in the Divisional Court at the time of its decision of the question before it (c).

46. Subject to any Rules of Court, any Judge of the said High Court, sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case, or point in a case, to be argued before a Divisional Court; and any Divisional Court of the said High Court shall have power to hear and determine any such case or point so reserved or so directed to be argued.

See O. XXXVI., r. 22a.

47. The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the Justices of either Bench and the Barons of the Exchequer by the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter seventy-eight, intituled "An Act for the further amendment of the administration of the Criminal Law," or any Act amending the same, shall and may be exercised after the commencement of this Act by the Judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the Judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said Judges under the said Act of the eleventh and twelfth years of Her Majesty's reign.

The Court of Appeal has decided that no appeal lies to it in any

36 & 37 VIC.
c. 66.

§§ 46, 47.

Application for leave to appeal from decision to Court of Appeal.

Cases and points may be reserved for or directed to be argued before Divisional Courts.

Amended, 38 & 39 Vict. c. 77, s. 22. Partly repealed by 39 & 40 Vict. c. 59, s. 17, which see.

Provision for Crown cases reserved.

See also Act of 1875, s. 19.

(a) *Le Blanch v. Reuter's Telegram Co.*, 1 Ex. D. 408; 34 L. T. N. S. 691; 25 W. R. 115.

(b) *Cousens v. Lombard Deposit Bank*, 45 L. J. C. P. D. 573; 35 L. T. N. S. 484; 25 W. R. 116.

(c) *Edmunds v. Foster*, 20 S. J. 211.

No appeal in criminal matters save for error of law apparent on record.

36 & 37 VIC.
c. 66.

§§ 48, 49.

Motions for new
trials to be
heard by
Divisional
Courts.
What orders
shall not be
subject to
Appeal.

matter of a criminal character (a); see also Act of 1875, s. 19, and O. LXII. *post*; but a writ of error in criminal matters may go to it, since it seems to have taken the place of the Exchequer Chamber.

48. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*

49. No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order.

An order made in fact by consent, but not alleged on its face to be by consent, was for the purpose of Appeal treated as not made by consent, as it is competent to withdraw a consent when the order comes to be drawn up before the registrar (b), but in this case leave was granted to apply in the Court below to amend the order by inserting the consent, and on this being done (c), and the order amended, the Court of Appeal struck it out (d). Notwithstanding this section it has been held that an order that defendant, being guilty of a breach of an injunction, should pay the costs of the plaintiff on a motion to commit him for the breach, is a good subject-matter of an Appeal (e). In the case of *Saunders v. Stewart* (f), the Court in a considered judgment had reduced the damages sought to a nominal sum, and granted on the application of the plaintiff a certificate for costs, which however was not embodied in the order as drawn up. The defendant opposed the taxation of costs, and the plaintiff took out summons to have the costs taxed, which was referred to the Court. The question thereupon arose whether the Court would hear such a matter, and it was urged that this was in fact an appeal on a question of costs. The Court refused to allow the case to be made a precedent, but heard it *pro hac vice*.

In *In re Hoskins' Trusts* (g) it was objected that the appeal from the decision of Malins, V.-C., was for costs only without leave of the Judge. The order was upon petition for payment out of Court of fund paid in under Trustees Relief Act. The fund was subject to a general power by will of a married woman, and she, by her will made in the lifetime of her husband, bequeathed legacies and directed that the residue of the fund should be divided among five persons, and appointed two executors, one of whom proved the will. The husband had a life interest in the fund, and on his death the trustees of the settlement offered to pay it to the beneficiaries, but a difficulty arose as to the proof of their title, and they, with the consent of the executor, paid the fund into Court. The bene-

(a) *Reg. v. Steel*, 2 Q. B. D. 37; 46 L. J. M. C. 1; 35 L. T. N. S. 534; 25 W. R. 34; *Reg. v. Fletcher*, 2 Q. B. D. 43; 46 L. J. M. C. 4; 35 L. T. N. S. 538; 25 W. R. 149; see also *Blake v. Beech*, 2 Ex. D. 335; 36 L. T. N. S. 723.

(b) *Plant v. Bristowe*, 20 S. J. 584.

(c) S. C. 20 S. J. 604.

(d) S. C. 20 S. J. 603.

(e) *Witt v. Corcoran*, 2 Ch. D. 69; 45 L. J. Ch. D. 603; 34 L. T. N. S. 550; 24 W. R. 501.

(f) 20 S. J. 605.

(g) 25 W. R. 779; 21 S. J. 669.

As to costs
only.

ficiaries petitioned for payment of the fund. Malins, V.-C., held it was clearly settled by *Re Philbrick's Settlement*, 34 L. J. Ch. 368, and *Hayes v. Outley*, L. R. 14 Eq. 1, that the executor could give a valid discharge for the fund, and that the trustees ought to have paid it to him, and ordered the trustees, under these circumstances, to pay the costs of the payment into, and of the petition for payment out of Court. *Drake v. The Attorney-General*, 10 Cl. & F. 257, was quoted before him against this decision without avail. The trustees appealed, and the question was elaborately argued, but the Court of Appeal held that *Taylor v. Dowlan*, L. R. 4 Ch. 697, 17 W. R. 779, is a conclusive authority, and dismissed the appeal.

36 & 37 VIC.
c. 66.

§ 50.

See generally on this section **O. LVIII.**

In the case of *Marcus v. General Steam Navigation Company* (a), an action was brought for subtraction of articles out of three packages delivered by the plaintiff, for carriage by three different ships of the defendants. At the trial plaintiff succeeded as to two only. The defendants obtained a rule absolute for a new trial on the usual terms, costs of first trial to abide the result of the second; on the new trial defendants succeeded as to all three packages. The master refused to allow the costs of the issue in the first action as to the package on which the defendant had succeeded. Judge in Chambers and Court affirmed disallowance. On appeal, the Court held that this section did not apply to the case, and allowed the defendants the costs of the first trial of the issue on which they had succeeded. In the case of *Re the Rio Grande do Sul Steamship Co.*, a matter on the face of it apparently only a question of costs, was allowed to be taken on Appeal, as it involved a question of law and principle (b). The V.-C. having deprived the successful party of costs, who gave no notice under **O. LVIII., r. 6**, of his intention to raise this question upon appeal, he was not permitted, as respondent on the appeal, to open the question (c). By this section the power given to appeal, on matter of costs is discretionary with the Judge of the primary Court, and not subject to appeal (d).

It has been held that no appeal lies on an interpleader summons, disposed of summarily under sect. 14 of the Common Law Procedure Act, 1860 (e). See **O. I., r. 2**, and note to **s. 19**, ante, p. 17.

50. Every order made by a Judge of the said High Court in Chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the Judge sitting in Court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal.

As to discharging orders made in Chambers.

(a) W. N. 1876, 157; 35 L. T. N. S. 353.

(b) 21 S. J. 276.

(c) *Harris v. Aaron*, 4 Ch. D. 749; 46 L. J. Ch. D. 488; 36 L. T. N. S. 43; 25 W. R. 352.

(d) *Taylor v. Eckersley*, 21 S. J. 558.

(e) *Dodds v. Shepherd*, 1 Ex. D. 75; 45 L. J. Ex. D. 457; 34 L. T. N. S. 358; 24 W. R. 322.

36 & 37 VIC.
c. 66.

§§ 51, 52.

When an
appeal will lie
under this sect.

Provision for
absence or
vacancy in the
office of a Judge.

Power of a
single Judge in
Court of
Appeal.

Orders made by a Judge in Chambers, except orders made in the exercise of "such discretion as aforesaid" (what these words refer to is by no means obvious, but it is supposed they refer to costs mentioned in the foregoing section as being left by law, "in the discretion of the Court"), may be set aside or discharged upon notice by any Divisional Court, or by the Judge sitting in Court, according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned. This would seem to bear reference to ss. 41 and 42 respectively, by which the Banc business of the Common Law Courts was given to Divisional Courts now altered as mentioned above, and the Chancery, Probate, Divorce, and Admiralty business to single Judges.

It has been held that in the Chancery Division an appeal may lie to the Court of Appeal direct, without leave, from an order in Chambers, where the matter has been heard before the Judge himself, which fact in such case must be stated in the order or certified by the Chief Clerk on application (a). Probably when cases in the Common Law Division have been for some time heard as they are now before a single Judge, a similar rule will find its way into the Common Law Divisions also. Baggallay, J. A., held that this clause was fatal to the right of appeal to the Court of Appeal from a refusal by the President of the Divorce Division of a motion for a new trial (b). An order made by a Registrar sitting as Judge under O. LIV., is not for this purpose an order made by a Judge in Chambers; and hence, when an order is so made and afterwards reviewed by a Judge, an appeal will not lie without special leave (c).

51. Upon the request of the Lord Chancellor, it shall be lawful for any Judge of the Court of Appeal, who may consent so to do, to sit and act as a Judge of the said High Court, or to perform any other official or ministerial acts for or on behalf of any Judge absent from illness or any other cause, or in the place of any Judge whose office has become vacant, or as an additional Judge of any Division; and while so sitting and acting any such Judge of the Court of Appeal shall have all the power and authority of a Judge of the said High Court.

Under this section, as has been observed in note to s. 17, the late Lords Justices of Appeal in Chancery have been appointed additional Judges of the Chancery Division for the purpose of allowing them to act under the Trustee Acts where the order ought to be made in Chancery as well as in lunacy (d).

52. In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the

(a) *Murr v. Cooke*, W. N. 1876, 193; 34 L. T. N. S. 751; 24 W. R. 756.

(b) *Wallis v. Wallis*, 2 P. D. 141; 36 L. T. N. S. 161; 25 W. R. 387; *Gladstone v. Gladstone*, 2 P. D. 143; 25 W. R. 387; *Robinson v. Robinson*, 2 P. D. 77; 36 L. T. N. S. 122; 25 W. R. 388; see also *Westhead v. Westhead*, 2 P. D. 1; 46 L. J. P. D. A. 32; 25 W. R. 35.

(c) *The Vivar*, 2 P. D. 29; 35 L. T. N. S. 782; 25 W. R. 453.

(d) 20 S. J. 24, 45.

Court of Appeal; and a single Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof.

36 & 37 VIC.
c. 66.

§§ 52-54.

53. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*
See also s. 12 of same Act.

Divisional
Courts of Court
of Appeal.

This section is repealed by the Act of 1875, s. 33 and Sched. 2, and is replaced by s. 12 of that Act, as follows:—"Every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a final order, decree, or judgment, be heard before not less than three Judges of the said Court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two Judges of the said Court sitting together."

Provision of
Act of 1875 as
to sittings of
Court of
Appeal.

"Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal. Subject to the provisions contained in this section the Court of Appeal may sit in two divisions at the same time."

It may be remarked that it is not defined in this clause whether the Court of Appeal, for the purpose of determining whether a decree, order, or judgment be final or interlocutory, which may be a very important question at times, is to be composed of three Judges or of two only. This question, almost immediately on the sitting of the Court, became of importance. Early in Nov., 1875, two Judges of the Court of Appeal were sitting on a day appointed for hearing appeal motions: one of the matters in the paper was an appeal from an order made on an adjourned summons with regard to the construction of a will; another was an appeal from the refusal of a Vice-Chancellor to rectify the register of shareholders of a company by omitting the name of the applicant therefrom; a third involved the question whether the appellant was liable to be placed on the list of contributories of a company in liquidation. With regard to all these matters their lordships were of opinion there was at least a doubt whether the order was final or interlocutory, and declined to hear them (a). It is to be taken that all summonses finally settling rights of parties, whether under winding-up orders or in administration suits, are to be held final, and dealt with by full Court (b). Thus an appeal from an order allowing items in accounts which were being taken under a decree in an action to realise mortgages of ships was ordered to be heard before full Court of Appeal (c).

Who to deter-
mine whether
matter be final
or interlocu-
tory.

What are final
orders.

54. *Repealed by 38 & 39 Vict. c. 77, s. 4.*

This section is repealed by 38 & 39 Vict. c. 77, s. 4, and the following enacted in its place:—"No Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself or made by any Divisional Court of the High Court of which he was and is a member." The words in this section "and is" a member have been held to be surplusage; a Judge has been held to be competent to take part in an appeal from a Divisional Court of which he

Judges not to
sit on appeal
from their own
judgments.

"And is" held
to be sur-
plusage.

(a) 20 S. J. 4.

(b) *Memorandum*, 1 Ch. D. 41.

(c) *Baring v. Stanton*, 20 S. J. 561.

36 & 37 VIC.
c. 66.

§ 55.

Extension of
rule desirable.

is a member on a case in which he was not one of the sitting Judges when it was heard in the Division (a). It might have been desirable that the section should have gone on to prevent any Judge of the Court of Appeal sitting on the hearing of any appeal made by any Divisional Court of which he was a member when such judgment or order was made; the present rule only provides for the case of the ex-officio and occasional Judges. Such a rule as is suggested would affect the Lords Justices of Appeal as well, when promoted to be such from any of the Divisions of the High Court.

Arrangements
for business of
Court of
Appeal, and
for hearing
Appeals trans-
ferred from the
Judicial Com-
mittee of the
Privy Council.

55. Repealed by 39 & 40 Vict. c. 59, s. 24.

(a) *Fisher v. Val de Travers Paving Co.*, 1 C. P. D. 259 ; 45 L. J. (App.) C. P. D. 135 ; 24 W. R. 198.

36 & 37 VIC.
c. 66.

§ 56.

PART IV.

Trial and Procedure.

56. Subject to any Rules of Court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the Court or by any Divisional Court or Judge before whom such cause or matter may be pending for inquiry and report to any official or special Referee, and the report of any such Referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. The High Court or the Court of Appeal may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such special Referees or assessors shall be determined by the Court.

Referees and
assessors.See s. 83 *post*.
See also O.
XXXVI., rr.
29a, 29b, 29c, 30,
31, 32, 33, 34.

This section makes provision for new officers, but makes no limit to their number or qualifications. It fixes afterwards, by s. 83, by whom they are to be appointed. Four referees have, in fact, been appointed. The section does not, nor do the subsequent sections, in any way abrogate the powers of reference which the Common Law Courts had under the Common Law Procedure Acts, 1852 and 1854 (a). A reference made to a master of a cause pending on the 1st Nov., 1875, with directions that proceedings were to be carried on under Judicature Acts, was held to be nevertheless a reference under the Common Law Procedure Acts for decision, not for report (b). It is to be observed that the reference under this Act is to be for inquiry and report, and does not permit the calling in of assessors until the hearing under the latter part of the section; and in a light and air suit, where application was made to the Court for the appointment of a skilled surveyor to view the premises, and report thereon to the Court as to the injury done to the plaintiffs, it was refused with costs on this

This sect. does
not interfere
with the
powers of
reference under
C. L. P. Acts,
1852, 1854.To be for
inquiry and
report only.(a) *Anon.*, 20 S. J. 122; W. N. 1876, 63; *Anon.*, 20 S. J. 299.(b) *Cruikshank v. Floating Swimming Baths Co.*, 1 C. P. D. 260; 45 L. J. C. P. D. 684; 34 L. T. N. S. 733; 24 W. R. 644.

36 & 37 VIC.
c. 66.

§ 57.

Appeal from
order.

ground (a). The remuneration of *special* referees in the case of *Willis v. Litchfield* was five guineas per sitting (b), and it seems the costs of the appointment of assessors is to be paid in the first instance by the successful party, and recovered by him against the unsuccessful party (c). An order by a referee under this Act may, it has been held, be brought in appeal before a Judge of the High Court (d). It seems an official referee, in an inquiry as to the amount of damage sustained, should state in his report not only the amount, but the facts on which it was based, and on what principle the damages had been assessed (e).

Power to direct
trials before
Referees.

57. In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a Judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an official Referee, to be appointed as herein-after provided, or before a special Referee to be agreed on between the parties; and any such special Referee so agreed on shall have the same powers and duties and proceed in the same manner as an official Referee. All such trials before Referees shall be conducted in such manner as may be prescribed by Rules of Court, and subject thereto in such manner as the Court or Judge ordering the same shall direct.

Rules as to
Referees.

Rules referring to referees will be found, **O. XXXVI.**, rr. 29a, *et seq.*, to end of order.

Cases under
this sect.

But notwithstanding this section where the Judge had made order for trial before a Judge and assessors, and it appeared that defendant had given notice (under **O. XXXVI. r. 3.**, which see) for trial before judge and jury, it was held that the defendant had a right to insist on a trial by jury, and that his notice held good (f). Reading a great number of letters is not a "prolonged examination of documents" (g). It was held

(a) *Baltic Co., Limited, v. Simpson*, 24 W. R. 390; 20 S. J. 331.

(b) W. N. 1876, 130; 20 S. J. 437; as to fees of official referees, see Order of February 1st, 1876, and 24th April, 1877.

(c) *The Dunkeld*, W. N. 1876, 66.

(d) *Rowcliffe v. Leigh*, 4 Ch. D. 661; 46 L. J. Ch. D. 60; 25 W. R. 56.

(e) *Mayor of Birmingham v. Allen*, W. N. 1877, 190.

(f) *Sugg v. Silber*, 1 Q. B. D. 362; 45 L. J. Q. B. D. 460; 34 L. T. N. S. 682; 24 W. R. 640.

(g) *Green's Trustee v. Barrett*, W. N. 1875, 204; 20 S. J. 56; see also W. N. 1875, 200; *Atkinson v. Ellison*, W. N. 1875, 201; *Skinner v. Dodds*, *ib.* 202.

a proper question for compulsory reference whether a skating rink had been properly built or not (a); and examination of furniture in a house has been held to be a "local examination" (b). In a suit for administration a claim was brought in for £19,000 for pictures and articles of vertu supplied: a motion was made to try before special or official referee this claim; an objection was raised that only questions of fact or of account were allowed to be so tried. The Vice-Chancellor gave a large construction to the word "account," and made an order referring the matter to the official referee in rotation (c). But in an administration action, *Re Leigh* (*Rowcliffe v. Leigh*) a picture-dealer had brought in a claim for a large sum in respect of nineteen pictures sold by him to the testator; the claim had been disputed, and questions of warranty and settled accounts had arisen, and the matter had been referred to an official referee (see 3 Ch. D. 292; 24 W. R. 782); subsequently executrix brought an action against the picture-dealer (*Leigh v. Brooks*) to set aside a sale of a larger number of pictures sold to and paid for by the testator, and application was made to Vice-Chancellor Hall for plaintiff in last-mentioned action that it might be referred to referee before whom Brooks' claim was pending in the administration action. The Vice-Chancellor held that he had no jurisdiction to make such order; he had referred the claim in the administration action for which he had clear jurisdiction, but the reference of an action was a different thing; in this case issue had been joined, but no notice of trial given, and by referring it, it might well be that he might deprive the defendant of a clear right to have the action tried by a jury (see O. XXXVI., r. 3). It was probable that the action would end in a reference, but he could not consider that now, in the face of the defendant's opposition, and the motion must be refused with costs: 21 S. J. 297, on appeal; 5 Ch. D. 592; 46 L. J. Ch. D. 344; 25 W. R. 401. A master had had a reference made to him under the 3rd section of the Common Law Procedure Act, 1854; and under this clause made a reference of a matter before him to a surveyor; the Judge refused to alter his order (d). As to the order of reference without consent of parties, see case below (e). Where a party has already elected his mode of trial, it seems he is not at liberty to change it without the consent of the opposite party (f). In *Fearnhough v. Fernell* (g), Fry, J., expressed a doubt whether this section applies to the ordinary taking of an account under a decree. As to referring entire action, see *Carlile v. Bush* (h).

36 & 37 VIC.
c. 66.

§ 58.

58. In all cases of any reference to or trial by Referees under this Act, the Referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by Rules of Court or (subject to such Rules) by the Court or Judge ordering such reference or trial; and the report of any Referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury.

Power of
Referees and
effect of their
findings.

(a) 20 S. J. 100.

(b) *Per Quain, J.*, 20 S. J. 102; see also *Sugg v. Silber*, *supra*.

(c) *Re Leigh, deceased*, 3 Ch. D. 292; 24 W. R. 782.

(d) *Anon.*, 20 S. J. 198.

(e) *Liverpool, Brazil, and River Plate Steam Navigation Co. v. London and St. Katherine Steam Navigation Co.*, W. N. 1875, 203; 20 S. J. 55.

(f) *Lascelles v. Butt*, 2 Ch. D. 588; 35 L. T. N. S. 122; 24 W. R. 659.

(g) 21 S. J. 609.

(h) 21 S. J. 650.

36 & 37 VIC.
c. 66.

§§ 59, 60.

Motion to set aside report of official referee to be supported by affidavit.

With reference to this section, also, the case before-mentioned of *Rowcliffe v. Leigh* (a), in which it was held that an appeal will lie from an official Referee to a Judge of the High Court requires to be noticed. It has been held in *Stubbs v. Boyle* (b) that a motion to set aside the report of an official referee must be supported by affidavit, and can only be supported on grounds which formerly would have been sufficient to justify referring an award back to an arbitrator, and the Court refused to refer for detailed findings.

Powers of Court with respect to proceedings before Referees.

59. With respect to any such proceedings before Referees and their Reports, the Court or such Judge as aforesaid shall have, in addition to any other powers, the same or the like powers as are given to any Court whose jurisdiction is hereby transferred to the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards respectively, by the Common Law Procedure Act, 1854.

Sections of Common Law Procedure Act, 1854, as to arbitration.

The sections containing these powers are from 3 to 17, both inclusive, of 17 & 18 Vict. c. 125 (the Common Law Procedure Act, 1854). As to arbitration, see "Lush's Practice," 3rd edition, 1037, *et seq.*, to 1070; also Day's Common Law Practice, 3rd edition, p. 205-217.

Her Majesty may establish District Registries in the country for the Supreme Court.

Amended, 38 & 39 Vict. c. 77, s. 13; see *Order in Council* of 12th Aug., 1875.

60. And whereas it is expedient to facilitate the prosecution in country districts of such proceedings as may be more speedily, cheaply, and conveniently carried on therein, it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars in such places as shall be in such order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are herein-after mentioned; and Her Majesty may thereby appoint that any Registrar of any County Court or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from which an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such District Registrar, shall and may be a District Registrar of the said High Court

(a) 4 Ch. D. 661; 46 L. J. Ch. D. 60; 25 W. R. 56.

(b) 2 Q. B. D. 124; 46 L. J. (App.) C. P. D. 136; 35 L.T. N. S. 906; 25 W. R. 184.

for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are herein-after mentioned. This section shall come into operation immediately upon the passing of this Act.

36 & 37 VIC.
c. 66.

§§ 60-62.

This clause is amended by s. 13 of Act of 1875 as follows :—" Whereas " by s. 60 of the principal Act it is provided that for the purpose of " facilitating the prosecution in country districts of legal proceedings, it " shall be lawful for Her Majesty, by Order in Council, from time to " time to direct that there shall be District Registrars in such places as " shall be in such order mentioned for districts to be thereby defined ; and " whereas it is expedient to amend the said section, be it therefore enacted " that—

Clause of Act
of 1875 as to
District Regis-
trars.

" Where any such order has been made, two persons may, if required, " be appointed to perform the duties of District Registrar in any district " named in the order, and such persons shall be deemed to be joint " District Registrars, and shall perform the said duties in such manner as " may from time to time be directed by the said Order, or any Order in " Council amending the same.

" Moreover, the Registrar of any inferior Court of Record having " jurisdiction in any part of any district defined by such order (other " than a County Court) shall, if appointed by Her Majesty, be quali- " fied to be a District Registrar for the said district, or for any such " part thereof as may be directed by such order or any order amending the " same.

" Every District Registrar shall be deemed to be an officer of the " Supreme Court, and be subject accordingly to the jurisdiction of such " Court and of the divisions thereof."

61. In every such District Registry such seal shall be used as the Lord Chancellor shall from time to time, either before or after the time fixed for the commencement of this Act, direct, which seal shall be impressed on every writ and other document issued out of or filed in such District Registry, and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such District Registry, shall in all parts of the United Kingdom be received in evidence without further proof thereof.

Seals of District
Registries.

62. All such District Registrars shall have power to administer oaths and perform such other duties in respect of any proceedings pending in the said High Court of Justice or in the said Court of Appeal as may be assigned to them from time to time by Rules of Court, or by any special order of the Court.

Powers of
District
Registrars.

The Rules of Court will be the means by which these officers will be authorised or controlled, and it is to them principally that attention must be directed ; in fact, in almost every particular of this Act the Rules of

Rules of Court
referring to
District
Registries.

36 & 37 VIC.
c. 66.

§§ 63-65.

Court are more important in their consequences than the Act itself. **O. XXXV.** refers entirely to district registries, and **O. V.**, r. 1, and **O. XII.**, **O. XIX.**, and **O. XXIX.** refer to them. On this rule see *McDonald v. Foster (a)*.

Fees to be
taken by
District
Registrars.
Proceedings to
be taken in
District
Registries.

63. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*

64. Subject to the Rules of Court in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the District Registrars when thereunto required; and unless any order to the contrary shall be made by the High Court of Justice, or by any Judge thereof, all such further proceedings, including proceedings for the arrest or detention of a ship, her tackle, apparel, furniture, cargo, or freight, as may and ought to be taken by the respective parties to such action in the said High Court down to and including entry for trial, or (if the plaintiff is entitled to sign final judgment or to obtain an order for an account by reason of the non-appearance of the defendant) down to and including final judgment, or an order for an account, may be taken before the District Registrar, and recorded in the District Registry, in such manner as may be prescribed by Rules of Court; and all such other proceedings in any such action as may be prescribed by Rules of Court shall be taken and if necessary may be recorded in the same District Registry.

Issue of writs of summons under this section is provided for by **O. V.**, rr. 1, 3; appearance by **O. XII.**, rr. 2, 4, 6a, 7, 8; proceedings by **O. XXXV.**

District Registrars have no jurisdiction to appoint receivers or direct banking accounts to be opened unless a Judge's order has directed specially that the accounts be taken in District Registry (b).

Power for Court
to remove pro-
ceedings from
District
Registries.

See **O. XXXV.**
rr. 11, 11a, 12,
13, 14.

65. Any party to an action in which a writ of summons shall have been issued from any such District Registry shall be at liberty at any time to apply, in such manner as shall be prescribed by Rules of Court, to the said High Court, or to a Judge in Chambers of the Division of the said High Court to which the action may be assigned, to remove the proceedings from such District Registry into the proper Office of the said High Court; and the Court or Judge may,

(a) W. N. 1877, 137; 25 W. R. 687; 21 S. J. 630; *post*, p. 81.

(b) *Re Smith's Estate, Hutchinson v. Ward*, 36 L. T. N. S. 178; 25 W. R. 452; W. N. 1877, 67; see **O. XXXV.**, r. 1.

if it be thought fit, grant such application, and in such case the proceedings and such original documents, if any, as may be filed therein shall upon receipt of such order be transmitted by the District Registrar to the proper Office of the said High Court, and the said action shall thenceforth proceed in the said High Court in the same manner as if it had been originally commenced by a writ of summons issued out of the proper office in London; or the Court or Judge, if it be thought right, may thereupon direct that the proceedings may continue to be taken in such District Registry.

36 & 37 VIC.
c. 66.

§§ 65-67.

66. It shall be lawful for the Court, or any Judge of the Division to which any cause or matter pending in the said High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced, or any accounts taken or inquiries made, in the office of or by any such District Registrar as aforesaid; and in any such case the District Registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any District Registrar, the report in writing of such District Registrar as to the result of such accounts or inquiries may be acted upon by the Court, as to the Court shall seem fit.

Accounts and inquiries may be referred to District Registrars.

It has been held that this section does not apply to such a proceeding as the appointment of a receiver or a trustee (*a*). Accounts or inquiries cannot be prosecuted in a District Registry except under direction of the Court or a Judge, unless in case of defendant's default under **O. XV. r. 1**, or **O. XXXV., r. 1 (b)**; but may under the direction of Court or Judge (*c*). This section is put in operation by **O. XXXIII.**, and by **O. XXXV., r. 1**.

67. The provisions contained in the fifth, seventh, eighth, and tenth sections of the County Courts Acts, 1867, shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court.

30 & 31 Vict.
c. 142, ss. 5, 7,
8, and 10 to
extend to
actions in High
Court.

The 5th section of the Act here mentioned, viz., 30 & 31 Vict. c. 142, provides that no costs shall be recovered by plaintiff on any action brought in any of Her Majesty's Superior Courts of record in which "the plaintiff

Costs not recoverable in Superior Courts

(*a*) *Walker v. Robinson*, W. N. 1876, 80; 34 L. T. N. S. 229; 24 W. R. 137, 427.

(*b*) *Irlam v. Irlam*, 2 Ch. D. 608; 24 W. R. 292, 949.

(*c*) *McDonald v. Foster*, W. N. 1877, 137; 25 W. R. 687; 21 S. J. 630.

36 & 37 VIC.
c. 66.

§ 67.

where less than
£20 on con-
tract or less
than £10 on
tort.

In certain cases
Judge of
Superior Courts
may order cause
to be tried in
County Court.

“ shall recover a sum not exceeding £20, if the action is founded on con-
“ tract, or £10 if ” “ founded on tort, whether by verdict, judgment by de-
“ fault, or on demurrer, or otherwise,” “ unless the Judge shall certify on
“ the record that there was sufficient reason for bringing the action in
“ such superior Court, or unless the Court or a Judge at Chambers shall by
“ Rule or Order allow such costs.” A plaintiff whose claim is reduced by
a counter-claim proved by the defendant recovers judgment under the
Judicature Acts for the balance only, and the question of costs under the
County Court Act, 1867, s. 5, must be decided with reference to that
balance (a). The 7th section of the County Court Act provides that, “ Where
“ in any action of contract brought or commenced in any of Her Majesty’s
“ Superior Courts of Common Law the claim indorsed on the writ does not
“ exceed £50, or where such claim, though it originally exceeded £50, is
“ reduced by payment, an admitted set off or otherwise to a sum not ex-
“ ceeding £50, it shall be lawful for the defendant in the action within eight
“ days from the day upon which the writ shall have been served upon him,
“ if the whole or part of the demand of the plaintiff be contested, to apply
“ to a Judge at Chambers for a summons to the plaintiff to show cause why
“ such action should not be tried in the County Court or one of the
“ County Courts in which the action might have been commenced; and
“ on the hearing of such summons the Judge shall, unless there be good
“ cause to the contrary, order such action to be tried accordingly, and
“ thereupon the plaintiff shall lodge the original writ and the order with
“ the Registrar of the County Court mentioned in the order, who shall
“ appoint a day for the hearing of the cause, notice whereof shall be sent
“ by post or otherwise by the Registrar to both parties or their attornies,
“ and the cause and all proceedings therein shall be heard and taken in
“ such County Court, as if the action had been originally commenced
“ in such County Court; and the costs of the parties in respect of pro-
“ ceedings subsequent to the order of the Judge of the Superior Court
“ shall be allowed according to the scale of costs in use in the County
“ Courts, and the costs of the proceedings previously had in the
“ Superior Court shall be allowed according to the scale in use in such
“ latter Court.”

The power given to a defendant under the section just quoted to apply
to have a case heard in the County Court, where the claim indorsed on
the writ exceeds £50, but has been reduced by payment below that
amount, does not apply where the reducing payment is made after
action (b).

Proceedings in
Equity may be
transferred to
County Courts
which might
have been com-
menced there-
in.

The 8th section of the County Court Act is as follows :—“ Where any suit
“ or proceeding shall be pending in the High Court of Chancery, which
“ suit or proceeding might have been commenced in a County Court, it shall
“ be lawful for any of the parties thereto to apply at Chambers to the Judge
“ to whose Court such suit or proceeding shall be attached, to have the same
“ transferred to the County Court or one of the County Courts in which the
“ same might have been commenced, and such Judge shall have power upon
“ such application, or without such application if he shall see fit, to make
“ an order for such transfer, and thereupon such suit or proceeding shall
“ be carried on in the County Court to which the same shall be ordered to
“ be transferred, and the parties thereto shall have the same right of
“ appeal that they would have had had the suit or proceeding been com-
“ menced in the County Court.”

Actions for
malicious pro-
secution, &c.,

The 10th section provides that “ it shall be lawful for any person against
“ whom an action for malicious prosecution, illegal arrest, illegal distress,
“ assault, false imprisonment, libel, slander, seduction, or other action of

(a) *Staples v. Young*, 2 Ex. D. 324 ; 25 W. R. 304.

(b) *Osborne v. Homburg*, 1 Ex. D. 48 ; 45 L. J. Ex. D. 65 ; 33 L. T. N. S.
534 ; 24 W. R. 161.

"tort, may be brought in a Superior Court to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff, and thereupon a Judge of the Court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the Masters of the said Court, or satisfy the Judge that he has a cause of action fit to be prosecuted in the Superior Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the Judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the Registrar of such County Court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the Registrar to both parties or their attornies; and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed by a memorandum signed by them that the said County Court should have power to try the said action, and the same had been commenced by plaint in the said County Court; and the costs of the parties in respect of the proceedings subsequent to the order of the Judge of the Superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings in the Superior Court shall be allowed according to the scale in use in such latter Court."

36 & 37 VIC.
c. 66.

§ 68.

brought in
Superior Courts
may be remitted
to County Court
by Judge.

68. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*
See same Act, s. 17.

Rules of Court
may be made
by Order in
Council before
commencement
of the Act.

This section, which declares how the Rules of Court mentioned in it shall be made, has been repealed by Act of 1875, s. 33, and Sched. 2, which Act substitutes for the provisions of this section its own s. 17, as follows:—

"Her Majesty may at any time after the passing, and before the commencement of this Act, by Order in Council made upon the recommendation of the Lord Chancellor, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and the Lords Justices of Appeal in Chancery, or any five of them, and the other Judges of the several Courts intended to be united and consolidated by the principal Act as amended by this Act, or of a majority of such other Judges, make any further or additional Rules of Court for carrying the principal Act and this Act into effect, and in particular for all or any of the following matters, so far as they are not provided for by the Rules in the first Schedule to this Act; that is to say,—

Section 17 of
Act of 1875.
Provision as to
making, &c.,
Rules of Court
before or after
the commence-
ment of the
Act.

"1. For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers; and

"2. For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal; and

"3. Generally for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein.

"From and after the commencement of this Act, the Supreme Court may at any time, with the concurrence of a majority of the Judges thereof, present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), alter and annul any Rules of Court

In lieu of
sect. 74 of Act
of 1873.

36 & 37 VIC.
c. 66.

§ 69.

Section 25 of
Act of 1875.
Orders and
Rules to be
laid before
Parliament,
and may be
annulled on
address from
either House.

Continuation of
section 17 of
Act of 1875.

Remarks on
Power. In
whom vested.

Rules in
Schedule to
regulate pro-
cedure till
changed by
other Rules
after com-
mencement
of Act.

Section 16 of
Act of 1875.
Rules in first
Schedule in
substitution

“ for the time being in force, and have and exercise the same power of
“ making Rules of Court as is by this section vested in Her Majesty in
“ Council on the recommendation of the said Judges before the com-
“ mencement of this Act.

“ All Rules of Court made in pursuance of this section shall be laid
“ before each House of Parliament within such time, and shall be subject
“ to be annulled in such manner as is in this Act provided.”

The manner provided by the Act of 1875 for the annulment of Rules
laid before the Houses of Parliament is found in s. 25 of that Act, and
is as follows:—“ Every Order in Council and Rule of Court required by this
“ Act to be laid before each House of Parliament, shall be so laid within
“ forty days next after it is made, if Parliament is then sitting, or if not,
“ then within forty days after the commencement of the then next ensu-
“ ing session ; and if an address is presented to Her Majesty by either
“ House of Parliament, within the next subsequent forty days on which
“ the House shall have sat, praying that such Rule or Order may be
“ annulled, Her Majesty may thereupon by Order in Council annul the
“ same ; and the Rule or Order so annulled shall thenceforth become void
“ and have no effect, but without prejudice to the validity of any pro-
“ ceedings which may in the meantime have been taken under the same.
“ This section shall come into operation immediately on the passing of
“ this Act.” It is in fact a mere re-enactment of the latter part of s. 68
of the Act of 1873.

“ All Rules of Court made in pursuance of this section, if made before
“ the commencement of this Act, shall from and after the commence-
“ ment of this Act, and if made after the commencement of this Act,
“ shall from and after they come into operation, regulate all matters to
“ which they extend, until annulled or altered in pursuance of this sec-
“ tion. The reference to certain Judges in s. 27 of the principal Act
“ shall be deemed to refer to the Judges mentioned in this section as
“ the Judges on whose recommendation an Order in Council may be
“ made.”

The first part of this section, which gives power to make Rules to Her
Majesty with the advice of the Lord Chancellor and the Lord Chief
Justice of England, the Master of the Rolls, the Lord Chief Justice of
the Common Pleas, the Lord Chief Baron of the Exchequer, and the
Lords Justices of Appeal in Chancery, or any five of them, and the other
Judges of the several Courts intended to be united and consolidated by
the Act, or of a majority of such other Judges, is open to some objec-
tions. How, if the Lord Chancellor and the Lord Chief Justice of
England should not agree with a majority of the Judges, or with one
another?—the rules in such case could not be made, for there is no one
to decide between the conflicting parties in either such case. It is not
supposed that such is a likely contingency, but it is possible, and if it
occurred would be very inconvenient.

69. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*
See same Act, ss. 16, 17.

This section is also repealed by Act 1875, s. 33 and Sched. 2 ; and s. 16
of that Act now replaces it, which runs as follows :—“ The Rules of Court
“ in the first Schedule to this Act shall come into operation at the com-
“ mencement of this Act, and as to all matters to which they extend shall
“ thenceforth regulate the proceedings of the High Court of Justice and
“ Court of Appeal. But such Rules of Court, and also all such other
“ Rules of Court (if any), as may be made after the passing and before
“ the commencement of this Act, under the authority of the next section,

" may be annulled or altered by the authority by which new Rules of Court may be made after the commencement of this Act." These are given in the note to the last foregoing section.

36 & 37 VIC.
c. 66.

§§ 70-73.

70. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*
See same Act, s. 18.

for 36 & 37
Vict. c. 66,
s. 69, and
Schedule.

This section also is repealed by Act of 1875, s. 33 and Sched. 2, and is replaced by s. 18, as follows:—"All Rules and Orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to Appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in bankruptcy matters, except so far as they are expressly varied by the first Schedule hereto, or by Rules of Court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be altered or annulled by any Rules of Court made after the commencement of this Act."

Rules of Pro-
bate, Divorce,
Admiralty, and
Bankruptcy
Courts to be
Rules of the
High Court.

Section 18 of
Act of 1875.
Provision as to
Rules of Pro-
bate, Divorce,
and Admiralty
Courts being
Rules of the
High Court.

71. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*
See same Act, s. 19.

This section is also repealed by Act of 1875, s. 33 and Sched. 2, and replaced by s. 19, as follows:—"Subject to the first Schedule hereto and any Rules of Court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved, shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act." See also s. 47, and note thereon.

Criminal pro-
cedure, subject
to future Rules,
to remain
unaltered.

Section 19 of
Act of 1875.
Provision as to
Criminal pro-
cedure subject
to future Rules
remaining
unaltered.

72. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*
See same Act, s. 20.

This section is also repealed by Act of 1875, s. 33 and Sched. 2, and replaced by s. 20, as follows:—"Nothing in this Act or in the first Schedule hereto, or in any Rules of Court to be made under this Act, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries."

Act not to
affect rules of
evidence or
juries.

Section 20 of
Act of 1875.
Provision as to
Act not affect-
ing Rules of
evidence or
juries.

73. *Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.*
See same Act, s. 21.

This section also is repealed by the Act of 1875, s. 33, and Sched. 2, and replaced by s. 21, as follows:—"Save as by the principal Act or this Act, or by any Rules of Court may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the

Saving of exist-
ing procedure
of Courts when
notinconsistent
with this Act
or Rules.

Section 21 of
Act of 1875.
Provision for
saving of exist-
ing procedure

36 & 37 VIC.
c. 66.

§§ 74, 75.

of Courts when
not inconsistent
with this Act
or Rules of
Court.

Rules of
evidence and
as to juries not
subject to inter-
ference by
Rules of Court.

Power to make
and alter Rules
after com-
mencement of
Act.

Council of
Judges to con-
sider procedure
and adminis-
tration of
justice.

“ said Court of Appeal respectively, under or by virtue of any law, custom,
“ general order, or rules whatsoever, and which are not inconsistent with
“ the principal Act or this Act or with any Rules of Court, may continue
“ to be used and practised in the said High Court of Justice and the said
“ Court of Appeal respectively in such and the like cases, and for such
“ and the like purposes, as those to which they would have been applicable
“ in the respective Courts of which the jurisdiction is so transferred if the
“ principal Act and this Act had not passed.”

In point of fact the four last foregoing sections, though purporting to be repealed and replaced by the 18th, 19th, 20th, and 21st of the Act of 1875, are unchanged, the new forms being merely made to meet the change in the mode in which the Rules are now provided, viz., by annexation as a Schedule to Act of 1875. By the last two foregoing sections—

The rules of evidence and the laws as to juries and jurymen are put expressly out of the power of interference by Rules of Court, save that by them the power of the Court for special reasons to allow depositions or affidavits to be read may be defined; and in all matters where Rules do not expressly alter the practice, the old practice formerly existing in the Courts by this Act transferred and consolidated prevails absolutely unchanged in similar cases.

*74. Repealed by 38 & 39 Vict. c. 77, s. 33, and Sched. 2.
See same Act, s. 17.*

This section is also, by Act 1875, s. 33, and Sched. 2, repealed, and the portion of s. 17 of that Act, which is marked to that effect at the margin above, p. 83, is substituted for it.

75. A Council of the Judges of the Supreme Court, of which due notice shall be given to all the said Judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Lord Chancellor, with the concurrence of the Lord Chief Justice of England, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the said Courts respectively, and of inquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the said High Court of Justice or the said Court of Appeal, or in any other Court from which any appeal lies to the said High Court or any Judge thereof, or to the said Court of Appeal: And they shall report annually to one of Her Majesty's Principal Secretaries of State what (if any) amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provisions (if any) which cannot be carried into effect without the authority of

Parliament it would be expedient to make for the better administration of justice. Any Extraordinary Council of the said Judges may also at any time be convened by the Lord Chancellor.

36 & 37 VIC.
c. 66.

§§ 75, 76.

This section was, when passed, a complete novelty ; by it a Council of the Judges is instituted to meet every year, at a time to be fixed by the Lord Chancellor, to consider the operation of the Act and of the Rules of Court, and the working of the offices of Court, and to inquire into and examine any defects which might seem to exist in the system of procedure, or the administration of the law in the High Court of Justice or the Court of Appeal, or in any Court from which an appeal lay to either of such Courts or any Judge thereof. The Council is to report to a Secretary of State what amendments or alterations, if any, should be made by Parliament for the better administration of justice. The Chancellor may at any time convene an extraordinary Council of Judges.

Machinery for
amendment of
Judicature.

76. All Acts of Parliament relating to the several Courts and Judges, whose jurisdiction is hereby transferred to the said High Court of Justice and the said Court of Appeal respectively, or wherein any of such Courts or Judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done after the commencement of this Act, as if the said High Court of Justice or the said Court of Appeal, and the Judges thereof, respectively, as the case may be, had been named therein instead of such Courts and Judges whose jurisdiction is so transferred respectively ; and in all cases not hereby expressly provided for in which, under any such Act, the concurrence or the advice or consent of the Judge or any Judges, or of any number of the Judges, of any one or more of the Courts whose jurisdiction is hereby transferred to the High Court of Justice is made necessary to the exercise of any power or authority capable of being exercised after the commencement of this Act, such power or authority may be exercised by and with the concurrence, advice, or consent of the same or a like number of Judges of the said High Court of Justice ; and all general and other Commissions, issued under the Acts relating to the Central Criminal Court or otherwise, by virtue whereof any Judges of any of the Courts whose jurisdiction is so transferred may, at the commencement of this Act, be empowered to try, hear, or determine any causes or matters, criminal or civil, shall remain and be in full force and effect, unless and until they shall respectively be in due course of law revoked or altered.

Acts of Parlia-
ment relating
to former
Courts to be
read as apply-
ing to Courts
under this Act.

36 & 37 VIC.
c. 66.

§ 76.

Effect of sec-
tion.

This section keeps alive all Acts of Parliament relating to any of the Courts whose jurisdiction is transferred to the High Court and the Court of Appeal, as if those Courts were respectively mentioned in the Acts in lieu of the Courts therein mentioned, and where any powers are given to Judges of existing Courts, the like powers are to be exercisable by the same or a similar number of Judges of the High Court.

36 & 37 VIC.
c. 66.

§ 77.

PART V.

Officers and Offices.

77. The Queen's Remembrancer, and all Masters, Secretaries, Registrars, Clerks of Records and Writs, Associates, Prothonotaries, Chief and other Clerks, Commissioners to take oaths or affidavits, Messengers, and other officers and assistants at the time of the commencement of this Act attached to any Court or Judge whose jurisdiction is hereby transferred to the High Court, or to the Court of Appeal, and also all Registrars, Clerks, officers, and other persons at the time of the commencement of this Act engaged in the preparation of commissions or writs, or in the registration of judgments or any other ministerial duties in aid of, or connected with, any Court, the jurisdiction of which is hereby transferred to the said Courts respectively, shall, from and after the commencement of this Act, be attached to the Supreme Court, consisting of the said High Court of Justice and the said Court of Appeal: Provided, that all the duties with respect to Appeals from the Court of Chancery of the County Palatine of Lancaster which are now performed by the Clerk of the Council of the Duchy of Lancaster shall be performed by the Registrars, Taxing Masters, and other officers by whom like duties are discharged in the Supreme Court; and the said Clerk of the Council of the Duchy of Lancaster shall not be an officer attached to the said Court.

Transfer of
existing staff of
officers to
Supreme Court.
See 38 & 39
Vict. c. 77,
s. 34.

The officers so attached shall have the same rank and hold their offices by the same tenure and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions, be entitled to the same pensions, as if this Act had not passed, and any such officer who is removable by the Court to which he is now attached shall be removable by the Court to which he shall be attached under this Act, or by the majority of the Judges thereof.

The existing Registrars and Clerks to the Registrars in the Chancery Registrars' office shall retain any right of succession secured to them by Act of Parliament, so as to entitle

36 & 37 VIC.
c. 66.

§ 77.

them in that office, or in any substituted office, to the succession to appointments with similar or analogous duties and with equivalent salaries.

The business to be performed in the High Court of Justice and in the Court of Appeal respectively, or in any Divisional or other Court thereof, or in the chambers of any Judge thereof, other than that performed by the Judges, shall be distributed among the several officers attached to the Supreme Court by this section in such manner as may be directed by Rules of Court; and such officers shall perform such duties in relation to such business as may be directed by Rules of Court, with this qualification, that the duties required to be performed by any officer shall be the same, or duties analogous to those which he performed previously to the passing of this Act; and, subject to such Rules of Court, all such officers respectively shall continue to perform the same duties, as nearly as may be, in the same manner as if this Act had not passed.

All Secretaries, Clerks, and other officers attached to any existing Judge who under the provisions of this Act shall become a Judge of the High Court of Justice, or of the Court of Appeal, shall continue attached to such Judge and shall perform the same duties as those which they have hitherto performed, or duties analogous thereto; and all such last-mentioned officers shall have the same rank and hold their offices by the same tenure, and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions, be entitled to the same pensions, as if this Act had not passed: Provided that the Lord Chancellor may, with the consent of the Treasury, increase the salary of any existing officer whose duties are increased by reason of the passing of this Act.

Upon the occurrence of a vacancy in the office of any officer coming within the provisions of this section, the Lord Chancellor, with the concurrence of the Treasury, may, in the event of such office being considered unnecessary, abolish the same, or may reduce the salary, or alter the designation or duties thereof, notwithstanding that the patronage thereof may be vested in an existing Judge. Nothing in this Act contained shall interfere with the office of Marshal attending any Commissioner of Assize.

The effect of this section is to annex to the new Courts all the officers belonging to the formerly existing Courts, but some difficulty may arise in its construction; for instance, it is provided that any officer who is removable by the Court to which he was formerly attached

shall be removable by the Court to which he is attached under this Act, or by the majority of the Judges thereof. Now in the Act the use of the word Court is rather uncertain. We have even the expression a Court of the High Court, and as there is a division of the High Court into several divisions corresponding to the old Courts, each of which divisions is in some parts of the Act recognized as a Court, it may raise a doubt whether these Divisional Courts may not be the Courts intended in this section, as having jurisdiction to dismiss the officers who were, up to the passing of the Act, within the similar jurisdiction of the old Courts. See **O. LX.**, r. 1. We anticipate, however, that this will not be the construction; as separate bodies there are two permanent Courts, the High Court of Justice and the Imperial Court of Appeal, and the officers belong to one or other of these two, no matter to what division they are attached, for the performance of their duties. This is, on the whole, our opinion, though it cannot be said to be quite free from doubt; for sometimes it seems as if the arrogation of officers was only to the one entity, viz., the Supreme Court, while in the passage referred to there must be two at least contemplated, and if so, it may be said, why not more? This section also, in fact, provides that the new system of judicature shall be very like the old, for it provides that, subject to the Rules of Court, all the officers respectively shall continue to perform the same duties as nearly as may be in the same manner as if this Act had not passed. Now the duties of the Chancery officers were certainly, formerly, not in any way like the duties of the Common Law officers, because the practice of the Courts was not in the least like, nor can the practice of the Divisions be assimilated while the duties of the officers of some Divisions remain so unlike those of the officers of the others; this difference is here perpetuated, and so, of course, the difference of the practice, which is in reality founded on a true difference in the nature of the duties to be performed by the different Divisions.

The Registrar of Ecclesiastical and Admiralty causes is by the Act of 1875, **s. 8**, included as an officer of the Supreme Court under this section.

36 & 37 VIC.
c. 66.

§ 78.

Whether officers removable by Divisional Courts.

Not much change in system of judicature from old system anticipated.

78. The existing Queen's Counsel of the County Palatine of Lancaster shall for the future have the same precedence in the County, and the existing Prothonotaries and District Prothonotaries, and other officers of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham respectively, and their successors, shall (subject to Rules of Court) perform the same or the like duties and exercise the same or the like powers and authorities in respect of all causes and matters depending in those Courts respectively at the commencement of this Act, and also in respect of all causes and matters which may afterwards be commenced in the High Court of Justice in the manner heretofore practised in the said Court of Common Pleas at Lancaster and the said Court of Pleas at Durham respectively, as at the commencement of this Act may lawfully be performed and exercised by them respectively under any Acts of Parliament for the time being in force with respect to the

Officers of Courts of Pleas at Lancaster and Durham.

36 & 37 VIC.
c. 66.

§§ 78-79.

said last-mentioned Courts respectively, or under any other authority; and all powers in respect of any such Prothonotaries, District Prothonotaries, or other officers of the Court of Common Pleas at Lancaster, which at the commencement of this Act may be vested by Law in the Chancellor of the Duchy and County Palatine of Lancaster, under any such Act of Parliament or otherwise, and to which the concurrence of any other authority may not be required, shall and may be exercised after the commencement of this Act by the Lord Chancellor; and all the powers of making or publishing any general rules or orders with respect to the powers or duties of such Prothonotaries, District Prothonotaries, or other officers of the said Court of Common Pleas at Lancaster or the said Court of Pleas at Durham, or with respect to the business of the said Court respectively, or with respect to any fees to be taken therein, or otherwise with reference thereto, which under any such Act as aforesaid or otherwise by law may be vested in the Chancellor of the Duchy and County Palatine of Lancaster, with the concurrence of any Judges or Judge, or in any other authority, shall be exercised after the commencement of this Act in the manner hereby provided with respect to Rules of Court to be made under this Act, and (in all cases in which the sanction of the Treasury is now required) with the sanction of the Treasury; and all provisions made by any such Acts as aforesaid, or otherwise, for or with respect to the remuneration of any such Prothonotaries, District Prothonotaries, or other officers as aforesaid, shall remain and be in full force and effect until the same shall be altered under the provisions of this Act, or otherwise by lawful authority.

See also Act of 1875, s. 27.

Personal
officers of
future Judges.

79. Each of the Judges of the High Court of Justice, and of the Ordinary Judges of the Court of Appeal, appointed respectively after the commencement of this Act, and also such of the Ordinary Judges of the Court of Appeal as have no similar officers at the time of the commencement of this Act, shall have such officers as herein-after mentioned, who shall be attached to his person as such Judge, and appointed and removable by him at his pleasure, and who shall respectively receive the salaries herein-after mentioned; (that is to say,)

To the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, respectively, there shall be attached a Secretary, whose salary shall be five hundred pounds per annum, a Principal Clerk, whose salary shall be four hundred pounds per annum, and a Junior Clerk, whose salary shall be two hundred pounds per annum. To each of the other Judges of the High Court of Justice, and to each of the Ordinary Judges of the Court of Appeal, there shall be attached a Principal Clerk, whose salary shall be four hundred pounds per annum, and, in the case of the Judges of the High Court of Justice, a Junior Clerk, whose salary shall be two hundred pounds per annum.

36 & 37 VIC.
c. 66.

§§ 79-81.

Such one or more of the officers so attached to each of the said Judges, as such Judge shall think fit, shall be required, while in attendance on such Judge, to discharge, without further remuneration, the duties of Crier in Court or on Circuit, or of Usher or Train Bearer. The duties of Chamber Clerks, so far as relates to business transacted in chambers by Judges appointed after the commencement of this Act, shall be performed by officers of the Court in the permanent Civil Service of the Crown.

See s. 35 of the Act of 1875.

80. Any existing officer attached to any existing Court or Judge whose jurisdiction is abolished or transferred by this Act, who is paid out of fees, and whose emoluments are affected by the passing of this Act, shall be entitled to prefer a claim to the Treasury; and the Treasury, if it shall consider his claim to be established, shall have power to award to him such sum, either by way of compensation, or as an addition to his salary, as it thinks just, having regard to the tenure of office by such officer and to the other circumstances of the case.

Provisions as
to officers paid
out of fees.

By the Act of 1875, s. 8, certain officers are specifically provided for.

81. Where a doubt exists as to the position under this Act of any existing officer attached to any existing Court or Judge affected by this Act, such doubt may be determined by Rules of Court: subject to this proviso, that such Rules of Court shall not alter the tenure of office, rank, pension, (if any), or salary of such officer, or require him to perform any

Doubts as to
the status of
officers to be
determined by
Rule.

36 & 37 VIC.
c. 66.

§§ 82-84.

Powers of Commissioners to administer oaths.

duties other than duties analogous to those which he has already performed.

82. Every person who at the commencement of this Act shall be authorised to administer oaths in any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice shall be a Commissioner to administer oaths in all causes and matters whatsoever which may from time to time be depending in the said High Court or in the Court of Appeal.

Official Referees to be appointed.

83. There shall be attached to the Supreme Court permanent officers to be called Official Referees, for the trial of such questions as shall under the provisions of this Act be directed to be tried by such Referees. The number and the qualifications of the persons to be so appointed from time to time, and the tenure of their offices, shall be determined by the Lord Chancellor, with the concurrence of the Presidents of the Divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England shall be one), and with the sanction of the Treasury. Such Official Referees shall perform the duties entrusted to them in such places, whether in London or in the country, as may from time to time be directed or authorised by any order of the said High Court, or of the Court of Appeal; and all proper and reasonable travelling expenses incurred by them in the discharge of their duties shall be paid by the Treasury out of moneys to be provided by Parliament.

We have already remarked on the appointment of Official Referees in note to s. 56, *et seq.* The number and qualifications of the persons to be appointed, and the tenure of their offices, are determined by the Lord Chancellor with the concurrence of the Presidents of the Divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England shall be one), and with the sanction of the Treasury. As to their fees, see Orders, Feb. 1st, 1876, and 24th April, 1877, *post*.

Duties, appointment, and removal of officers of Supreme Court.

84. Subject to the provisions in this Act contained with respect to existing officers of the Courts whose jurisdiction is hereby transferred to the Supreme Court, there shall be attached to the Supreme Court such officers as the Lord Chancellor with the concurrence of the Presidents of the Divisions of the High Court of Justice, or the major part of them, of which majority the Lord Chief Justice of England

shall be one, and with the sanction of the Treasury, may from time to time determine. 36 & 37 VIC.
c. 66.

Such of the said several officers respectively as may be thought necessary or proper for the performance of any special duties, with respect either to the Supreme Court generally, or with respect to the High Court of Justice or the Court of Appeal, or with respect to any one of the Divisions of the said High Court, or with respect to any particular Judge or Judges of either of the said Courts, may by the same authority, and with the like sanction as aforesaid, be attached to the said respective Courts, Divisions, and Judges accordingly. §§ 84, 85.

All officers assigned to perform duties with respect to the Supreme Court generally, or attached to the High Court of Justice or the Court of Appeal, and all Commissioners to take oaths or affidavits in the Supreme Court, shall be appointed by the Lord Chancellor.

All officers attached to the Chancery Division of the said High Court, who have been heretofore appointed by the Master of the Rolls, shall continue, while so attached, to be appointed by the Master of the Rolls.

All other officers attached to any Division of the said High Court shall be appointed by the President of that Division.

All officers attached to any Judge shall be appointed by the Judge to whom they are attached.

Any officer of the Supreme Court (other than such officers attached to the person of a Judge as are herein-before declared to be removable by him at his pleasure), may be removed by the person having the right of appointment to the office held by him, with the approval of the Lord Chancellor, for reasons to be assigned in the order of removal.

The authority of the Supreme Court over all or any of its officers may be exercised in and by the said High Court and the said Court of Appeal respectively, and also in the case of officers attached to any Division of the High Court by the President of such Division, with respect to any duties to be discharged by them respectively.

This section provides for the patronage as to all new officers, on the principle of giving the patronage of all special appointments as nearly as may be to those specially concerned in the conduct of the officer, or to the service of the Court concerned, or President of the Division concerned. Patronage of
officers.

85. There shall be paid to every official Referee and other Salaries and

36 & 37 VIC.
c. 66.

§§ 85-87.

pensions of
officers.

salaries officer appointed in pursuance of this Act such salary out of moneys to be provided by Parliament as may be determined by the Treasury with the concurrence of the Lord Chancellor.

An officer attached to the person of a Judge shall not be entitled to any pension or compensation in respect of his retirement from or the abolition of his office, except so far as he may be entitled thereto independently of this Act; but every other officer to be hereafter appointed in pursuance of this part of the Act, and whose whole time shall be devoted to the duties of his office, shall be deemed to be employed in the permanent Civil Service of Her Majesty, and shall be entitled, as such, to a pension or compensation in the same manner, and upon the same terms and conditions, as the other permanent civil servants of Her Majesty are entitled to pension or compensation.

Patronage not
otherwise pro-
vided for.

86. Subject to the provisions herein-before contained, any rights of patronage and other rights or powers incident to any Court, or to the office of any Judge of any Court whose jurisdiction is transferred to the said High Court of Justice, or to the said Court of Appeal, in respect of which rights of patronage or other rights or powers no provision is or shall be otherwise made by or under the authority of this Act, shall be exercised as follows, that is to say: if incident to the office of any existing Judge shall continue to be exercised by such existing Judge during his continuance in office as a Judge of the said High Court or of the Court of Appeal, and after the death, resignation, or removal from office of such existing Judge shall be exercised in such manner as Her Majesty may by Sign Manual direct.

Solicitors and
attorneys.

*Amended, 38 &
39 Vict. c. 77,
s. 14.*

87. From and after the commencement of this Act all persons admitted as solicitors, attorneys, or proctors of or by law empowered to practise in any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called Solicitors of the Supreme Court, and shall be entitled to the same privileges and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed; and all persons who from time to time, if this Act had not passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of or been by law empowered to practise in any

such Courts, shall be entitled to be admitted and to be called Solicitors of the Supreme Court, and shall be admitted by the Master of the Rolls, and shall, as far as circumstances will permit, be entitled as such solicitors to the same privileges and be subject to the same obligations as if this Act had not passed.

36 & 37 VIC.
c. 66.

§ 87.

Any solicitors, attorneys, or proctors to whom this section applies shall be deemed to be Officers of the Supreme Court; and that Court, and the High Court of Justice, and the Court of Appeal respectively, or any Division or Judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys as any one of Her Majesty's superior courts of law or equity might previously to the passing of this Act have exercised in respect of any solicitor or attorney admitted to practise therein.

This section, providing for the position and status of attorneys and solicitors, is not very intelligible; it provides that from and after the commencement of the Act, all persons admitted as solicitors, attorneys, or proctors of or by law empowered to practise in any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called solicitors of the Supreme Court, and shall be entitled to the same privileges, and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed. It is presumed that the intention is to give all such persons full power to practise in the High Court and in the Court of Appeal, but this is certainly not said—*e.g.*, a man, by being admitted as an attorney, has no right at present to practise in the Courts of Equity, nor does his admission as a solicitor entitle him to practise in the Common Law Courts, though most persons who have taken the one title and office, have also taken the other; but as now the Courts will be only substantially the High Court of Justice and the Court of Appeal, it is submitted that the right to practise in either of these Courts in any division, involves the right to practise in all divisions of the same Court, though it is not well or fully expressed. The Master of the Rolls will in future be the only Judge to admit any one to practise in any branch of the Court. This clause is amended, in some respects, by s. 14 of Act 1875, as follows:—"Whereas under s. 87 of the principal Act, solicitors and attorneys will, after the commencement of that Act, be called solicitors of the Supreme Court: Be it therefore enacted, that—The registrar of attorneys and solicitors in England shall be called the Registrar of Solicitors, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of Common Pleas, and the Lord Chief Baron, or any two of them, may, from time to time, by regulation, adapt any enactments relating to attorneys, and any declaration, certificate, or form required under those enactments to the solicitors of the Supreme Court under s. 87 of the principal Act." See with reference to this clause 40 & 41 Vict. c. 25, "The Solicitors Act, 1877."

Presumed intention of section.

Section 14 of Act of 1875.

Under this clause, a proctor who had not taken advantage of s. 43 of the Probate Act, 1857, 20 & 21 Vict. c. 77, applied for a certificate. He was held entitled to be enrolled as a solicitor of the Supreme Court, but until so enrolled entitled to take out proctor's certificate only (*a*). Where the new

(*a*) *Re Toller*, W. N. 1875, 254; 20 S. J. 149, 162-3.

36 & 37 VIC.
c. 66.

§ 87.

roll was not yet made the rule followed by the Court in striking off attornies who have behaved ill was to strike off the old roll of the Court in the division whereof the application was made, and to forbid the name to be entered on the Roll of the Supreme Court, and to give notice to the Master of the Rolls of the order (a).

Rules under this section and s. 14 of the Act of 1875, have been published (b).

(a) *Re J. C. Martin and J. Martin*, 24 W. R. 111 ; see 1 P. D. 302, sub nom. *Crisp v. Martin* ; also on application of an attorney to be struck off, *Ex parte Ernest Payne*, 20 S. J. 4.

(b) See 20 S. J. 15.

36 & 37 VIC.
c. 66.

§§ 88-90.

PART VI.

Jurisdiction of Inferior Courts.

88. It shall be lawful for Her Majesty, from time to time by Order in Council to confer on any inferior Court of Civil jurisdiction, the same jurisdiction in Equity and in Admiralty, respectively, as any County Court now has, or may hereafter have, and such jurisdiction, if and when conferred, shall be exercised in the manner by this Act directed.

Power by Order in Council to confer jurisdiction on inferior Courts.

89. Every inferior Court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next herein-after contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

Powers of inferior Courts having Equity and Admiralty jurisdiction.

This s. 89 follows out, as regards the County Courts, the policy of ss. 24 and 25, enabling them, as to all causes of action within their jurisdiction, to award equitable relief, absolute or conditional, as fully as the High Court could, subject only to the restriction in the next section contained, viz., that if a defence or counter-claim of a defendant involves matter beyond the jurisdiction of the County Court, it may still allow the defence up to the limit of the action, but shall not go further, but in such case the High Court may, on the application of any party, order the whole proceeding to be transferred to it, or any division of it, and it is then to be transferred and continued and prosecuted, as if originally commenced in the High Court.

90. Where in any proceeding before any such inferior Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of

Counter claims in inferior Courts, and transfers therefrom.

36 & 37 VIC.
c. 66.

§§ 90, 91.

the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim: Provided always, that in such case it shall be lawful for the High Court, or any Division or Judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior Court to the High Court, or to any Division thereof; and in such case the Record in such proceeding shall be transmitted by the Registrar, or other proper officer, of the inferior Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein.

The mode of procedure to transfer under this section seems by summons, a stay of proceedings in the County Court being meantime granted (a).

Rules of law to
apply to in-
ferior Courts.

91. The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such Rules relate shall be respectively cognizable by such Courts.

Latter words
not easily
intelligible.

By s. 91 the rules of law laid down in ss. 24 and 25 are to be in force in all Courts, so far as the matters to which such rules relate shall be rightly cognizable by such Courts. It is not easy to understand the effect of these latter words, for it is presumed they only mean to guard against an enlargement of the jurisdiction in the matter of amount, and it is not easy to see how the words could by any construction enlarge the amount of jurisdiction.

(a) *Anon.*, W. N. 1876, 12; 20 S. J. 219.

36 & 37 VIC.
c. 66.

§§ 92-94.

PART VII.

Miscellaneous Provisions.

92. All books, documents, papers, and chattels in the possession of any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or to the Court of Appeal, or of any officer or person attached to any such Court, as such officer, or by reason of his being so attached, shall be transferred to the Supreme Court, and shall be dealt with by such officer or person in such manner as the High Court of Justice or the Court of Appeal may by order direct; and any person failing to comply with any order made for the purpose of giving effect to this section shall be guilty of a contempt of the Supreme Court.

Transfer of
books and
papers to
Supreme Court.

93. This Act, except as herein is expressly directed, shall not, unless or until other commissions are issued in pursuance thereof, affect the circuits of the Judges or the issue of any Commissions of Assize, Nisi Prius, Oyer and Terminer, Gaol Delivery, or other commissions for the discharge of civil or criminal business on circuit or otherwise, or any patronage vested in any Judges going circuit, or the position, salaries, or duties of any officers transferred to the Supreme Court who are now officers of the Superior Courts of Common Law, and who perform duties in relation to either the civil or criminal business transacted on circuit.

Saving as to
circuits, &c.

Circuits are regulated by the Act of 1875, s. 23, and orders in Council made thereon.

94. This Act, except so far as herein is expressly directed, shall not affect the office or position of Lord Chancellor; and the officers of the Lord Chancellor shall continue attached to him in the same manner as if this Act had not passed; and all duties, which any officer of the Court of Chancery may now be required to perform in aid of any duty whatsoever of the Lord Chancellor, may in like manner be required to be

Saving as to
Lord Chan-
cellor.

36 & 37 VIC.
c. 66.

§§ 95-99.

Saving as to
Chancellor of
Lancaster.

performed by such officer when transferred to the Supreme Court, and by his successors.

95. This Act, except so far as is herein expressly directed, shall not affect the officers, position, or functions of the Chancellor of the County Palatine of Lancaster.

See *ante*, ss. 16, 17, 77, and 78.

Saving as to
Chancellor of
the Exchequer

and sheriffs.

96. The Chancellor of the Exchequer shall not be a Judge of the High Court of Justice, or of the Court of Appeal, and shall cease to exercise any judicial functions hitherto exercised by him as a Judge of the Court of Exchequer; but save as aforesaid he shall remain in the same position as to duties and salary, and other incidents of his office, as if this Act had not passed. The same order and course with respect to the appointment of sheriffs, shall be used and observed in the Exchequer Division of the said High Court as has been heretofore used and observed in the Court of Exchequer.

Saving as to
Lord Treasurer
and office of
the Receipt of
Exchequer.

97. Nothing in this Act contained shall affect the office of Lord Treasurer, except that any Lord Treasurer shall not hereafter exercise any judicial functions hitherto exercised by him as a Judge of the Court of Exchequer; and nothing in this Act shall affect the office of the Receipt of the Exchequer.

Provisions as to
Great Seal
being in com-
mission.

98. When the Great Seal is in commission, the Lords Commissioners shall represent the Lord Chancellor for the purposes of this Act, save that as to the Presidency of the Court of Appeal, and appointment or approval of officers, or the sanction to any order for the removal of officers, or any other act to which the concurrence or presence of the Lord Chancellor is hereby made necessary, the powers given to the Lord Chancellor by this Act may be exercised by the Senior Lord Commissioner for the time being.

Provision as to
Commissions in
Counties
Palatine.

99. From and after the commencement of this Act, the Counties Palatine of Lancaster and Durham shall respectively cease to be Counties Palatine, so far as respects the issue of Commissions of Assize, or other like Commissions, but not

further or otherwise ; and all such Commissions may be issued for the trial of all causes and matters within such counties respectively in the same manner in all respects as in any other counties of England and Wales.

36 & 37 VIC.
c. 66.

§§99,100.

100. In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words herein-after mentioned shall, have, or include, the meanings following ; (that is to say,) Interpretation
of terms.

“ Lord Chancellor ” shall include Lord Keeper of the Great Seal.

“ The High Court of Chancery ” shall include the Lord Chancellor.

“ The Court of Appeal in Chancery ” shall include the Lord Chancellor as a Judge on Rehearing or Appeal.

“ London Court of Bankruptcy ” shall include the Chief Judge in Bankruptcy.

“ The Treasury ” shall mean the Commissioners of Her Majesty’s Treasury for the time being, or any two of them.

“ Rules of Court ” shall include forms.

“ Cause ” shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown.

“ Suit ” shall include action.

“ Action ” shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court ; and shall not include a criminal proceeding by the Crown.

“ Plaintiff ” shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

“ Petitioner ” shall include every person making any application to the Court, either by petition, motion, or summons, otherwise than as against any defendant.

“ Defendant ” shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.

“ Party ” shall include every person served with notice of, or attending any proceeding, although not named on the Record.

36 & 37 VIC.
c. 66.

§ 100.

“Matter” shall include every proceeding in the Court not in a cause.

“Pleading” shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant.

“Judgment” shall include decree.

“Order” shall include Rule.

“Oath” shall include solemn affirmation and statutory declaration.

“Crown cases reserved” shall mean such questions of law reserved in Criminal Trials as are mentioned in the Act of the eleventh and twelfth years of Her Majesty’s reign, chapter seventy-eight.

“Pension” shall include retirement and superannuation allowance.

“Existing” shall mean existing at the time appointed for the commencement of this Act.

4th definition
not probably
now applicable.

It is doubtful how far the 4th definition clause, that the London Court of Bankruptcy shall include the Chief Judge in Bankruptcy, is now applicable, considering the important change in the enactment as to this Court made by the Act of 1875.

“Action.”

With regard to the word “action,” the following case has been decided. A suit had been commenced before the 1st of Nov., 1875, one of the parties being an unmarried woman who married shortly after the commencement of the suit. An application was made by her through a next friend that the proceedings might be carried on against her husband. The Vice-Chancellor held that this was not an action within this clause, but held the applicant entitled to the order sought, but he thought the application need not have been made by motion in Court, application to the Registrar being sufficient (a). See **O. L., r. 1.**

“Pleading.”

With regard to the word “pleading,” the pleadings were held to be closed by delivery of reply though the defendant was in default as to production of documents which he had been ordered to make, and from that date the six weeks within which notice of trial should have been given began to run (b).

For further interpretation of terms, see **O. LXIII.**

(a) *Darcy v. Whittaker*, W. N. 1876, 17 ; 33 L. T. N. S. 778 ; 24 W. R. 244.

(b) *Cooper v. Castle*, 21 S. J. 457.

SUPREME COURT OF JUDICATURE ACT (1873) SUSPENSION.

37 & 38 VICT. CAP. 83.

*An Act for delaying the coming into operation of the
Supreme Court of Judicature Act, 1873.*

[7th August, 1874.]

WHEREAS it is expedient to extend the time appointed for
the commencement of the Supreme Court of Judicature Act,
1873 :

37 & 38 VIC.
c. 83.

§§ 1—3.

Be it enacted by the Queen's most Excellent Majesty,
by and with the advice and consent of the Lords Spiritual
and Temporal, and Commons, in this present Parliament
assembled, and by the authority of the same, as follows :

1. The second section of the Supreme Court of Judicature
Act, 1873, is hereby repealed.

Repeal of
36 & 37 Vict.
c. 66, s. 2.

2. The Supreme Court of Judicature Act, 1873, except
any provisions thereof directed to take effect on the passing
of the said Act, shall commence and come into operation on
the first day of November one thousand eight hundred and
seventy-five, and the said first day of November one thousand
eight hundred and seventy-five shall be taken to be the time
appointed for the commencement of the said Act.

Commence-
ment of
Supreme
Court of
Judicature
Act, 1873.

3. This Act may be cited for all purposes as the Supreme
Court of Judicature (Commencement) Act, 1874.

Short title of
Act.

SUPREME COURT OF JUDICATURE ACT (1873) AMENDMENT.

38 & 39 VICT. CAP. 77.

*An Act to amend and extend the Supreme Court of
Judicature Act, 1873. [2d August, 1875.]*

38 & 39 VIC.
c. 77.

§§ 1, 2.

WHEREAS it is expedient to amend and extend the Supreme Court of Judicature Act, 1873 :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Short title, and
construction
with 36 & 37
Vict. c. 66.

1. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Act, 1873, (in this Act referred to as the principal Act,) and together with the principal Act may be cited as the Supreme Court of Judicature Acts, 1873 and 1875, and this Act may be cited separately as the Supreme Court of Judicature Act, 1875.

Commence-
ment of Act.
*Partly repealed
by 39 & 40 Vict.
c. 59, s. 24,
which see.*

2. This Act, except any provision thereof which is declared to take effect before the commencement of this Act, shall commence and come into operation on the first day of November 1875. *Residue repealed as in side note.*

In consequence of this section, which in the interval before the passing of 39 & 40 Vict. c. 59, kept alive the appeals to the House of Lords for a time, it was held that enrolment of a decree no longer barred the right of appeal to the Court of Appeal as it formerly did to the Chancellor or Court of Appeal in Chancery, as if it were held otherwise it would bar the appeal to the House of Lords under this clause (a). See note to 39 & 40 Vict. c. 59, s. 24.

(a) *Allan v. United Kingdom Electric Telegraph Co.*, 24 W. R. 898 ; 20 S. J. 703 ; *Hastie v. Hastie*, 2 Ch. D. 304 ; 20 S. J. 391, 411.

3. "Whereas by section five of the principal Act it is provided as follows: that if at the commencement of this Act the number of puisne justices and junior barons who shall become Judges of the said High Court shall exceed twelve in the whole, no new Judge of the said High Court shall be appointed in the place of any such puisne justice or junior baron who shall die or resign while such whole number shall exceed twelve, it being intended that the permanent number of Judges of the said High Court shall not exceed twenty-one;" and whereas, having regard to the state of business in the several courts whose jurisdiction is transferred by the principal Act to the High Court of Justice, it is expedient that the number of Judges thereof should not at present be reduced: Be it enacted, that so much of the said section as is herein-before recited shall be repealed.

The Lord Chancellor shall, not be deemed to be a permanent Judge of that Court, and the provisions of the said section relating to the appointment and style of the Judges of the said High Court shall not apply to the Lord Chancellor.

This section is referred to in the notes to the principal Act, s. 5, which is directly affected by it, *ante*, p. 4.

4. Her Majesty's Court of Appeal, in this Act and in the principal Act referred to as the Court of Appeal, shall be constituted as follows: There shall be five ex-officio Judges thereof, and also so many ordinary Judges, *not exceeding three at any one time*, as Her Majesty shall from time to time appoint.

The ex-officio Judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.

The first ordinary Judges of the said Court shall be the present Lords Justices of Appeal in Chancery, and such one other person as Her Majesty may be pleased to appoint by Letters Patent. Such appointment may be made either before or after the commencement of this Act, but if made before shall take effect at the commencement of the Act.

The ordinary Judges of the Court of Appeal shall be styled Justices of Appeal.

The Lord Chancellor may by writing addressed to the President of any one or more of the following divisions of

38 & 39 VIC.
c 77.

§§ 3, 4.

Explanation of
36 & 37 Vict.
c. 66, s. 5, as
to number of
Judges.

Constitution of
Court of
Appeal.

Amended by
39 & 40 Vict.
c. 59, s. 15,
which see.

38 & 39 VIC.
c. 77.

§§ 4, 5.

*Amended by
39 & 40 Vict.
c. 59, s. 19,
which see.*

the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division, request the attendance at any time, except during the times of the spring or summer circuits, of an additional Judge from such division or divisions (not being ex-officio Judge or Judges of the Court of Appeal) at the sittings of the Court of Appeal, and a Judge, to be selected by the division from which his attendance is requested, shall attend accordingly.

Every additional Judge, during the time that he attends the sittings of Her Majesty's Court of Appeal, shall have all the jurisdiction and powers of a Judge of the said Court of Appeal, but he shall not otherwise be deemed to be a Judge of the said Court, or to have ceased to be a Judge of the division of the High Court of Justice to which he belongs.

Sect. 54 of Act
of 1873 re-
pealed.

Section fifty-four of the principal Act is hereby repealed, and instead thereof the following enactment shall take effect: No Judge of the said Court of Appeal shall sit as a Judge on the hearing of an Appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was and is a member.

Whenever the office of an ordinary Judge of the Court of Appeal becomes vacant a new Judge may be appointed thereto by Her Majesty by Letters Patent.

Effect of 39 &
40 Vict. c. 59
on the Court
of Appeal.

The Court of Appeal has been in a measure reconstituted by the Act of 39 & 40 Vict. c. 59, which in its s. 15 repeals the words italicized and amends the clause which is further amended by s. 19 of same Act. Under the clause as it stood, a Judge summoned to attend the Court of Appeal was not precluded from sitting on the hearing of an appeal because he was a Judge of the Division from which the appeal was brought if he had not been present at the hearing in the Division below (*a*). See note to s. 54 of Act of 1873.

It was held also that the Lords Justices of Appeal have since the Acts came in force no jurisdiction as Judges of the Chancery Division (*b*), except as before noticed, since they have been specially appointed additional Judges thereof as before mentioned. See note to s. 51 of Act of 1873.

For practice on appeals, see **O. LVIII.**, also Act of 1873, ss. 19, 28, 49, 50 and 52.

Tenure of office
of Judges, and
oaths of office.

5. All the Judges of the High Court of Justice, and of the Court of Appeal respectively, with the exception of the Lord

(*a*) *Fisher v. Val de Travers Paving Co.*, 1 C. P. D. 259; 45 L. J. (App. C. P. D. 135; 24 W. R. 198; 20 S. J. 129, 130, 131.

(*b*) *Glover v. Greenbank Alkali Co.*, W. N. 1876, 157.

Chancellor, shall hold their offices as such Judges respectively during good behaviour, subject to a power of removal by Her Majesty, on an address presented to Her Majesty by both Houses of Parliament. No Judge of either of the said Courts shall be capable of being elected to or of sitting in the House of Commons. Every person appointed after the passing of this Act to be Judge of either of the said Courts (other than the Lord Chancellor), when he enters on the execution of his office, shall take, in the presence of the Lord Chancellor, the oath of allegiance, and judicial oath as defined by the Promissory Oaths Act, 1868. The oaths to be taken by the Lord Chancellor shall be the same as heretofore.

38 & 39 VIC.
c. 77.

§§ 5-7.

Judges not to sit in the House of Commons.

See 36 & 37
Vict. c. 66,
s. 9.

This section is in lieu of s. 9 of the principal Act, which is repealed by s. 33 and Sched. 2 of this Act. It is precisely the same in intention as the repealed section, which was erroneous in not excepting the Lord Chancellor when providing that all Judges of the High Court of Justice should hold office during good behaviour.

In lieu of s. 9
of Act of 1873.

6. The Lord Chancellor shall be President of the Court of Appeal; the other ex-officio Judges of the Court of Appeal shall rank in the order of their present respective official precedence. The ordinary Judges of the Court of Appeal, and, not entitled to precedence as Peers or Privy Councillors, shall rank according to the priority of their respective appointments as such Judges.

Precedence of Judges.

See 36 & 37
Vict. c. 66,
s. 10.

The Judges of the High Court of Justice who are not also Judges of the Court of Appeal shall rank next after the Judges of the Court of Appeal, and, among themselves (subject to the provisions in the principal Act contained as to existing Judges), according to the priority of their respective appointments.

This section is in lieu of s. 10 of the principal Act, which is also repealed by s. 33 and Sched. 2 of this Act.

7. Any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind, shall be exercised by such Judge or Judges of the High Court of Justice or Court of Appeal as may be entrusted by the sign manual of Her Majesty or her successors with the care and commitment of the custody of such persons and estates; and all enactments referring to the Lords Justices as so entrusted shall be construed as if such Judge

Jurisdiction of Lords Justices in respect of lunatics.

See 36 & 37
Vict. c. 66,
s. 17.

38 & 89 VIC.
c. 77.

§§ 7, 8.

Lords Justices
of Appeal in
Chancery still
to sit apart in
Lunacy
matters.

or Judges so entrusted had been named therein instead of such Lords Justices: Provided that each of the persons who may at the commencement of the principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a Judge of the Court of Appeal, and is entrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid.

This section provides for an omission in the principal Act, in s. 17 whereof the lunacy jurisdiction of the Lords Justices, and the rest of the like jurisdiction mentioned in the present sections vested in them, is directed not to be transferred to or vested in the High Court, but did not provide any positive enactment showing how that jurisdiction was in future to be administered. This provision will of course require that the present Lords Justices of Appeal in Chancery, and the Judges who shall in future be appointed by Her Majesty's sign manual to the jurisdiction, shall exercise this jurisdiction sitting in a different Court from that to which they ordinarily belong or shall belong. See notes to s. 17, *ante*, p. 14.

For proceedings for and against lunatics, see O. IX., r. 5, O. XVIII. and O. XIX., r. 17.

Admiralty
Judges and
registrar.

8. Whereas by section eleven of the principal Act it is provided as follows: "Every existing Judge who is by this Act made a Judge of the High Court of Justice or an ordinary Judge of the Court of Appeal shall, as to tenure of office, rank, title, salary, pension, patronage, and powers of appointment or dismissal, and all other privileges and disqualifications, remain in the same condition as if this Act had not passed; and, subject to the change effected in their jurisdiction and duties by or in pursuance of the provisions of this Act, each of the said existing Judges shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform in pursuance of any Act of Parliament, law, or custom if this Act had not passed. No Judge appointed before the passing of this Act shall be required to act under any commission of assize, nisi prius, oyer and terminer, or gaol delivery, unless he was so liable by usage or custom at the commencement of this Act:"

And whereas the Judge of the High Court of Admiralty is by the principal Act appointed a Judge of the High Court of Justice:

And whereas such Judge is, as to salary and pension, inferior in position to the other puisne Judges of the superior courts of common law, but holds certain ecclesiastical and other offices in addition to the office of Judge of the High Court of Admiralty:

And whereas it is expedient that such Judge, if he be willing to relinquish such other offices, should be placed in the same position as to rank, salary, and pension as the other puisne Judges of the superior courts of common law :

38 & 39 VIC.
c. 77.

§ 8.

Be it enacted that—

If the existing Judge of the High Court of Admiralty, under his hand signifies to the Lord Chancellor in writing, before the commencement of the principal Act, that he is willing to relinquish such other offices as aforesaid, and does before the commencement of the principal Act resign all other offices of emolument held by him except the office of Judge of the High Court of Admiralty, he shall, from and after the commencement of the principal Act, be entitled to the same rank, salary, and pension as if he had been appointed a Judge of the High Court of Justice immediately on the commencement of the principal Act, with this addition, that, in reckoning service for the purposes of his pension, his service as a Judge of the High Court of Admiralty shall be reckoned in the same manner as if the High Court of Justice had been established at the time of his accepting the office of Judge of the High Court of Admiralty, and he had continued from such time to be a Judge of the said High Court of Justice.

The present holder of the office of registrar of Her Majesty in Ecclesiastical and Admiralty causes, shall, as respects any appeals in which he would otherwise be concerned coming within the cognizance of the Court of Appeal, be deemed to be an officer attached to the Supreme Court; and the office, so far as respects the duties in relation to such appeals as aforesaid, shall be deemed to be a separate office within the meaning of section seventy-seven of the principal Act, and may be dealt with accordingly. He shall be entitled, in so far as he sustains any loss of emoluments by or in consequence of the principal Act or this Act, to prefer a claim to the Treasury in the same manner as an officer paid out of fees whose emoluments are affected by the passing of the principal Act is entitled to do under section eighty of the principal Act.

Subject as aforesaid, the person who is at the time of the passing of this Act registrar of Her Majesty in Ecclesiastical and Admiralty causes shall, notwithstanding anything in the principal Act or this Act, have the same rank and hold his

38 & 39 VIC.
c. 77.

§§ 8, 9.

office upon the same tenure and upon the same terms and conditions as heretofore; but it shall be lawful for Her Majesty by Order in Council made upon the recommendation of the Lord Chancellor, with the concurrence of the Treasury, to make, notwithstanding anything contained in any Act of Parliament, such arrangements with respect to the duties of the said last-mentioned office, either by abolition thereof or otherwise, as to Her Majesty may seem expedient: Provided that such Order shall not take effect during the continuance in such office of the said person so being registrar at the time of the passing of this Act, without his assent.

Every Judge of the Probate, Divorce, and Admiralty Division of the said High Court of Justice appointed after the passing of this Act shall, so far as the state of business in the said division will admit, share with the Judges mentioned in section thirty-seven of the principal Act, the duty of holding sittings for trial by jury in London and Middlesex, and sittings under commissions of assize, oyer and terminer, and gaol delivery.

The object of this section seems to be to assimilate the position of the Judge of the Court of Admiralty to that of the other Judges of the High Court of Justice, and to make provision for the reduction of the machinery of the Court to a shape to make it workable as part of the duty of the Supreme Court, and render future Judges equally liable to try jury cases at London and Middlesex, and on Circuit, as the Common Law Judges now are.

As to saving rights, &c., of existing Judges, see Act of 1873, s. 11.

London Court
of Bankruptcy
not to be trans-
ferred to High
Court of
Justice.

9. The London Court of Bankruptcy shall not be united or consolidated with the Supreme Court of Judicature, and the jurisdiction of that Court shall not be transferred under the principal Act to the High Court of Justice, but shall continue the same in all respects as if such transfer had not been made by the principal Act, and the principal Act shall be construed as if such union, consolidation, and transfer had not been made: Provided that—

(1.) The office of Chief Judge in Bankruptcy shall be filled by such one of the Judges of the High Court of Justice appointed since the passing of the Bankruptcy Act, 1869, or, with his consent, of such one of the Judges appointed prior to the passing of the last-mentioned Act, as may be appointed by the Lord Chancellor to that office; and,

- (2.) The appeal from the London Court of Bankruptcy shall lie to the Court of Appeal in accordance with the principal Act.

38 & 39 VIC.
c. 77.

§§ 9, 10.

This section makes an important change in the law provided by the principal Act, which had abolished the London Court of Bankruptcy, and transferred its jurisdiction to the High Court of Justice, see s. 34; on this change and that since effected by the present section, we have already remarked in notes on s. 3 of the principal Act.

10. Whereas, by section twenty-five of the principal Act, after reciting that it is expedient to amend and declare the law to be thereafter administered in England as to the matters next therein-after mentioned, certain enactments are made with respect to the law, and it is expedient to amend the said section: Be it therefore enacted as follows:—

Amendment of
36 & 37 Vict.
c. 66, s. 25, as
to rules of law
upon certain
points.

Sub-section one of clause twenty-five of the principal Act is hereby repealed, and instead thereof the following enactment shall take effect; (that is to say,) in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

In sub-section seven of the said section the reference to the date of the passing of the principal Act shall be deemed to refer to the date of the commencement of the principal Act.

38 & 39 VIC.
c. 77.

§ 11.

(Subs. 1, 2.)

Provision as to
option for any
plaintiff (sub-
ject to Rules)
to choose in
what division
he will sue,—
in substitution
for 36 & 37
Vict. c. 66,
s. 35.

This section is already fully commented on in note to s. 25 of the Act of 1873; as to its second enacting clause it merely makes a slight change in the time at which a change, introduced by the principal Act, should come into operation; where the Statute referred to the passing of the Act, meaning to refer to its coming into operation, the legislators naturally expecting that when an Act passed it would come into operation, it was thought right by this section to amend the expression.

11. Subject to any Rules of Court and to the provisions of the principal Act and this Act and to the power of transfer, every person by whom any cause or matter may be commenced in the said High Court of Justice shall assign such cause or matter to one of the divisions of the said High Court as he may think fit, by marking the document by which the same is commenced with the name of such division, and giving notice thereof to the proper officer of the court: Provided that—

As to marking with Division or name of Judge, see Act of 1873, ss. 33, 42, O. II., r. 1, O. V., r. 4. As to notice of assignment to Division, see O. V., r. 9.

- (1.) All interlocutory and other steps and proceedings in or before the said High Court in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the division of the said High Court to which such cause or matter is for the time being attached; and,

But nevertheless by reference to s. 39 of the Act of 1873, it has been held that a Judge at Chambers of any Common Law Division may under O. LI., r. 2 and O. LIV., r. 2, transfer a cause whether from his own or any other Division to the Chancery Division (*a*), and it would seem by parity of reasoning do any other act within the competency of a Judge at Chambers as well for other Divisions as his own.

- (2.) If any plaintiff or petitioner shall at any time assign his cause or matter to any division of the said High Court to which, according to the Rules of Court or the provisions of the principal Act or this Act, the same ought not to be assigned, the Court, or any Judge of such division, upon being informed thereof, may, on a summary application at any stage of the cause or matter, direct the same to be transferred

(*a*) *Hillman v. Mayhew*, 1 Ex. D. 132; 45 L. J. Ex. D. 334; 34 L. T. N. S. 256; 24 W. R. 435; see also *per Mellish, L. J.*, in *Maclean v. Vaughan*, 20 S. J. 723.

to the division of the said Court to which, according to such rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner or by any other party in any such cause or matter, and all orders made therein by the Court or any Judge thereof before any such transfer shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper division of the said Court to which such cause or matter ought to have been assigned; and,

- (3.) Subject to Rules of Court, a person commencing any cause or matter shall not assign the same to the Probate, Divorce, and Admiralty Division unless he would have been entitled to commence the same in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, if this Act had not passed.

38 & 39 VIC.
c. 77.

§§ 11, 12.

This section is a mere provision to carry out, in the form intended to be provided, s. 35 of the Act of 1873, in which a slight error had been made, the effect of which seemed to exclude the Admiralty Division from taking cognizance of causes which before the Act were common to the Court of Admiralty and the Common Law Courts, in which either had jurisdiction, and which a plaintiff at his option might bring in either. No doubt the section leaving itself open to be modified by rules, and the rules made having in fact made the modification (see O. V., r. 4), the change in the section was not absolutely required, but it is no doubt better that the Act should legislate, and the rules follow the legislation, rather than that the rules should, by an exercise of a power granted them by the Statute, overrule an enactment, which was what had been done. This section is remarked on in notes to the principal Act, s. 35.

Error in 35th
section of Act
of 1873
amended.

12. Every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a final order, decree, or judgment, be heard before not less than three Judges of the said Court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two Judges of the said Court sitting together.

Sittings of
Court of
Appeal.
See 36 & 37
Vict. c. 66,
s. 53, repealed.

Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal.

38 & 39 VIC.
c. 77.

§§ 12-14.

Subject to the provisions contained in this section the Court of Appeal may sit in two divisions at the same time.

This section is remarked on in the notes on s. 53 of the principal Act, p. 72, which, being repealed, is replaced by this section.

Amendment of
s. 60 of 36 & 37
Vict. c. 66, as
to district
registrars.
*See Order in
Council of 12th
Aug., 1875.*

13. Whereas by section sixty of the principal Act it is provided that for the purpose of facilitating the prosecution in country districts of legal proceedings, it shall be lawful for Her Majesty by Order in Council from time to time to direct that there shall be district registrars in such places as shall be in such Order mentioned for districts to be thereby defined; and whereas it is expedient to amend the said section, be it therefore enacted that—

Where any such Order has been made, two persons may, if required, be appointed to perform the duties of district registrar in any district named in the Order, and such persons shall be deemed to be joint district registrars, and shall perform the said duties in such manner as may from time to time be directed by the said Order, or any Order in Council amending the same.

Moreover the registrar of any inferior Court of record having jurisdiction in any part of any district defined by such Order (other than a county court) shall, if appointed by Her Majesty, be qualified to be a district registrar for the said district or for any and such part thereof as may be directed by such Order or any Order amending the same.

Every district registrar shall be deemed to be an officer of the Supreme Court, and be subject accordingly to the jurisdiction of such Court, and of the divisions thereof.

This section amends s. 60 of the principal Act, by allowing joint district registrars to be appointed, and allowing the registrars of inferior Courts to be appointed district registrars, providing that every such officer shall, when appointed, be deemed an officer of the Supreme Court, to which he shall be subject.

Amendment of
36 & 37 Vict.
c. 66, s. 87, as
to enactments
relating to
attorneys.

14. Whereas under section eighty-seven of the principal Act, solicitors and attorneys will after the commencement of that Act be called solicitors of the Supreme Court: Be it therefore enacted that—

The registrar of attorneys and solicitors in England shall be called the registrar of solicitors, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron,

or any two of them, may, from time to time, by regulation adapt any enactments relating to attorneys, and any declaration, certificate, or form required under those enactments, to the solicitors of the Supreme Court under section eighty-seven of the principal Act.

38 & 39 VIC.
c. 77.

§§ 14-17.

This amends s. 87 of the principal Act, in the respects appearing on the face of it. See notes on that section.

15. It shall be lawful for Her Majesty from time to time, by Order in Council, to direct that the enactments relating to appeals from county courts shall apply to any other inferior court of record; and those enactments, subject to any exceptions, conditions, and limitations contained in the Order, shall apply accordingly, as from the date mentioned in the Order.

Appeal from
inferior Court
of Record.

See Act 1873, s. 45, and note thereon; also O. LVIII., r. 19.

16. The Rules of Court in the First Schedule to this Act shall come into operation at the commencement of this Act, and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court of Justice and Court of Appeal. But such Rules of Court, and also all such other Rules of Court (if any) as may be made after the passing and before the commencement of this Act under the authority of the next section, may be annulled or altered by the authority by which new Rules of Court may be made after the commencement of this Act.

Rules in First
Schedule in
substitution
for 36 & 37
Vict. c. 66,
s. 69, and
Schedule.

This section is to take the place of s. 69 of the Act of 1873, which is repealed, and gives validity to the Rules in the Schedule, which are in fact almost identical with the Rules in Schedule 1 of the principal Act. See notes on ss. 68 and 69 of Act of 1873.

17. Her Majesty may at any time after the passing and before the commencement of this Act, by Order in Council, made upon the recommendation of the Lord Chancellor, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and the Lords Justices of Appeal in Chancery, or any five of them, and the other Judges of the several Courts intended to be united and consolidated by the principal Act as amended by this Act, or of a majority of such

Provision as to
making, &c.,
of Rules of
Court before or
after the com-
mencement of
the Act,—in
substitution for
36 & 37 Vict.
c. 66, ss. 68,
69, 74, and
Schedule.

Partly repealed
by 39 & 40

38 & 39 VIC.
c. 77.

§ 17.

*Vict. c. 59,
s. 16.*

other Judges, make any further or additional Rules of Court for carrying the principal Act and this Act into effect, and in particular for all or any of the following matters, so far as they are not provided for by the Rules in the First Schedule to this Act; that is to say,

- (1.) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers; and,
- (2.) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal; and,
- (3.) Generally, for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein.

*In substitution
for 36 & 37
Vict. c. 66,
s. 74.*

*Amended by
39 & 40 Vict.
c. 59, s. 17,
which see.*

From and after the commencement of this Act, the Supreme Court may at any time, with the concurrence of a majority of the Judges thereof, present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), alter and annul any Rules of Court for the time being in force, and have and exercise the same power of making Rules of Court as is by this section vested in Her Majesty in Council on the recommendation of the said Judges before the commencement of this Act.

All Rules of Court made in pursuance of this section shall be laid before each House of Parliament within such time and shall be subject to be annulled in such manner as is in this Act provided.

All Rules of Court made in pursuance of this section, if made before the commencement of this Act, shall from and after the commencement of this Act, and if made after the commencement of this Act shall from and after they come into operation, regulate all matters to which they extend, until annulled or altered in pursuance of this section.

The reference to certain Judges in section twenty-seven of the principal Act shall be deemed to refer to the Judges mentioned in this section as the Judges on whose recommendation an Order in Council may be made.

This clause is a re-enactment in a somewhat amended form of portions ss. 68 and 74, with perhaps some bearing on s. 69, which is, how-

ever, mainly intended to be provided for by the last foregoing section. See the notes to those sections of the principal Act. The end of the section refers to s. 27 of the Act of 1873, and is remarked on in the note thereon.

38 & 39 VIC.
c. 77.

§ 18.

18. All Rules and Orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in bankruptcy matters, except so far as they are expressly varied by the First Schedule hereto or by Rules of Court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be altered or annulled by any Rules of Court made after the commencement of this Act.

Provision as to Rules of Probate, Divorce, and Admiralty Courts, being Rules of the High Court,—in substitution for 36 & 37 Vict. c. 66, s. 70.

The present Judge of the Probate Court and of the Court for Divorce and Matrimonial Causes shall retain, and the president for the time being of the Probate and Divorce Division of the High Court of Justice shall have, with regard to non-contentious or common form business in the Probate Court, the powers now conferred on the Judge of the Probate Court by the thirtieth section of the twentieth and twenty-first years of Victoria, chapter seventy-seven, and the said Judge shall retain, and the said president shall have, the powers as to the making of rules and regulations conferred by the fifty-third section of the twentieth and twenty-first years of Victoria, chapter eighty-five.

Powers of Judge of Probate Court and of Court for Divorce and Matrimonial Causes, and of President of Probate and Divorce Division to make rules.

This is a re-enactment, with slight alteration, of s. 70 of the principal Act repealed by s. 33 and Sched. 2. See the Rules made under this section, *post*.

It has been held that an appearance may still be entered in the Admiralty Division under protest as before the Acts in the Court of Admiralty, and that by such appearance the defendant has not necessarily submitted to the jurisdiction (*a*).

O. XXIX., r. 2 (which see), was held, since the amendment of O. XIII., r. 10, by Rules of Dec., 1875, not to apply in an Admiralty action *in rem*, but that the Admiralty Rules of 1859, rr. 75, 88, 105, applied still in such a case (*b*). As to bankruptcy appeals, in *In re Benson* (*c*) it was suggested from the Bench that special circumstances might not need to be shown under O. LVIII., r. 5, to allow further

(*a*) *The Vivar*, 25 W. R. 379 ; on appeal, 2 P. D. 29 ; 35 L. T. N. S. 782 25 W. R. 453.

(*b*) *The Polymede*, 1 P. D. 121 ; 34 L. T. N. S. 367 ; 24 W. R. 256 ; *The Sfactoria*, 2 P. D. 3 ; 35 L. T. N. S. 431 ; 25 W. R. 62

(*c*) 21 S. J. 47.

38 & 39 VIC.
c. 77.

§§ 19-21.

Provision as to criminal procedure, subject to future Rules remaining unaltered,—in substitution for 36 & 37 Vict. c. 66, s. 71.

evidence to be taken before Court of Appeal, and reference was made to Bankruptcy Rule 147 of 1870. The Court allowed further evidence tendered, without saying any special circumstances had been proved.

19. Subject to the first Schedule hereto and any Rules of Court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown cases reserved, shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act.

The same may be said of this section as regards s. 71 of the principal Act, also repealed in like manner. Criminal matters are in terms excluded from being dealt with by the Rules and Orders as yet, see O. LXII.

It has been noted, *ante*, s. 47 of principal Act, that the Court of Appeal has decided that it has no jurisdiction in any matter of a criminal character, not even as to costs (a).

Provision as to Act not affecting rules of evidence or juries,—in substitution for 36 & 37 Vict. c. 66, s. 72.

20. Nothing in this Act or in the First Schedule hereto, or in any Rules of Court to be made under this Act, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries.

This also is a re-enactment, with slight alteration, of s. 72 of the principal Act also repealed. See with reference to this section, O. XXXVII., r. 1.

Provision for saving of existing procedure of Courts when not inconsistent with this Act or Rules of Court,—in substitution for 36 & 37 Vict. c. 66, s. 73.

21. Save as by the principal Act or this Act, or by any Rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act or with any Rules of Court, may continue to be used and practised, in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they

(a) *Reg. v. Steel*, 2 Q. B. D. 37; 46 L. J. M. C. 1; 35 L. T. N. S. 534; 25 W. R. 34.

would have been applicable in the respective courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed.

38 & 39 VIC.
c. 77.

§§ 21, 22.

A remark similar to that made on the last section may be made of this section also as regards s. 73 of the principal Act also repealed. See as to Rules of Court, O. LXII.

As an instance of the effect of this section, the following case may be noted:—An action had been commenced in the Common Pleas in Oct., 1873; on Nov. 18th, 1875, judgment was given for defendants; on June 23rd, 1876, the Court of Appeal reversed the decision of the Common Pleas Division, and gave judgment for plaintiffs for £4,500 and costs. The judgment was entered up and costs taxed on July 21st, and the plaintiffs delivered to the sheriff a *fi. fa.* on July 22nd. A motion was made to the Court of Appeal *ex parte* to stay execution pending an appeal to the House of Lords; this was refused, but leave was given to serve short notice of motion for the stay. On the hearing of the motion, the Court held the Acts made no alteration in regard to the practice on appeals to the House of Lords. Upon appeal from Common Law Divisions the appellants could not have a stay of execution, unless they gave bail in error as under the old practice. If the time for that could be extended under the Common Law Procedure Acts, still the Court of Appeal was not the Court to apply to in the matter. The division to which the action was attached alone could extend the time (a).

22. Whereas by section forty-six of the principal Act it is enacted that "any Judge of the said High Court sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case or point in a case to be argued before a Divisional Court:" Be it hereby enacted, that nothing in the said Act, nor in any Rule or Order made under the powers thereof or of this Act, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the Judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues:

Nothing in principal Act to prejudice right to have issues submitted, &c.

Provided also, that the said right may be enforced either by motion in the High Court of Justice or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record.

S. 22 restrains the power of reserving matters for the decision of a divisional Court, so as to prevent the reservation of an issue of fact in such a way as to oust the jurisdiction on such a matter of a jury.

Where it is desired to appeal from a Judge's direction to the jury to the Court of Appeal, the proper mode is to give ordinary notice of appeal from the Judge's ruling (b).

Appeal from Judge's direction.

(a) *Justice v. The Mersey Steel and Iron Co.*, 1 C. P. D. 575; 24 W. R. 955.
(b) *Cheese v. Lovejoy*, 2 P. D. 161; 25 W. R. 453.

38 & 39 VIC.
c. 77.

§ 23.

Regulation of
circuits.

23. Her Majesty may at any time after the passing of this Act, and from time to time, by Order in Council, provide in such manner and subject to such regulations as to Her Majesty may seem meet, for all or any of the following matters :

1. For the discontinuance, either temporarily or permanently, wholly or partially, of any existing circuit, and the formation of any new circuit by the union of any counties or parts of counties, or partly in one way and partly in the other, or by the constitution of any county or part of a county to be a circuit by itself ; and in particular for the issue of commissions for the discharge of civil and criminal business in the county of Surrey to the Judges appointed to sit for the trial by jury of causes and issues in Middlesex or London or any of them ; and,
2. For the appointment of the place or places at which assizes are to be holden on any circuit ; and,
3. For altering by such authority and in such manner as may be specified in the Order, the day appointed for holding the assizes at any place on any circuit in any case, where, by reason of the pressure of business or other unforeseen cause, it is expedient to alter the same ; and,
4. For the regulation, so far as may be necessary for carrying into effect any Order under this section, of the venue in all cases, civil and criminal, triable on any circuit or elsewhere.

Her Majesty may from time to time, by Order in Council, alter, add to, or amend any Order in Council made in pursuance of this section ; and in making any Order under this section may give any directions which it appears to Her Majesty to be desirable to give for the purpose of giving full effect to such Order.

Provided that every Order in Council made under this section shall be laid before each House of Parliament within such time, and shall be subject to be annulled in such manner as is in this Act provided.

Any Order in Council purporting to be made in pursuance of this section shall have the same effect in all respects as if it were enacted in this Act.

The power hereby given to Her Majesty shall be deemed to be in addition to and not in derogation of any power

already vested in Her Majesty in respect of the matters aforesaid; and all enactments in relation to circuits, or the places at which assizes are to be holden, or otherwise in relation to the subject-matter of any Order under this section, shall, so far as such enactments are inconsistent with such Order, be repealed thereby, whether such repeal is thereby expressly made or not; but all enactments relating to the power of Her Majesty to alter the circuits of the Judges, or places at which assizes are to be holden, or the distribution of revising barristers among the circuits, or otherwise enabling or facilitating the carrying the objects of this section into effect, and in force at the time of the passing of the principal Act, shall continue in force, and shall, with the necessary variations, if any, apply, so far as they are applicable, to any alterations in or dealings with circuits, or places at which assizes are to be holden, made or to be made after the passing of this Act, or to any other provisions of any Order made under this section; and if any such Order is made for the issue of commissions for the discharge of civil and criminal business in the county of Surrey as before mentioned in this section, that county shall for the purpose of the application of the said enactments be deemed to be a circuit, and the senior Judge for the time being so commissioned, or such other Judge as may be for the time being designated for that purpose by Order in Council, shall, in the month of July or August in every year, appoint the revising barristers for that county and the cities and boroughs therein.

The expression "assizes" shall in this section be construed to include sessions under any commission of oyer and terminer, or gaol delivery, or any commission in lieu thereof issued under the principal Act.

This clause provides powers neglected or omitted to be given by the Act of 1873 for discontinuing, arranging, or extending circuits. It gives full power to Her Majesty, by Order in Council, to rearrange the circuits over England in such manner as may be most desirable from time to time, and seems to contain all the powers which may be needful for making any change therein which may be wanted. Such changes have been from time to time made.

24. Where any provisions in respect of the practice or procedure of any Courts the jurisdiction of which is transferred by the principal Act or this Act to the High Court of Justice or the Court of Appeal, are contained in any Act of Parliament, Rules of Court may be made for modifying such

38 & 39 VIC.
c. 77.

§§ 23, 24.

Additional
power as to
regulation of
practice and
procedure by
Rules of Court.

38 & 39 VIC.
c. 77.

§§ 24, 25.

provisions to any extent that may be deemed necessary for adapting the same to the High Court of Justice and the Court of Appeal, without prejudice nevertheless to any power of the Lord Chancellor, with the concurrence of the Treasury, to make any Rules with respect to the Paymaster-General, or otherwise.

Any provisions relating to the payment, transfer, or deposit into, or in, or out of any Court of any money or property, or to the dealing therewith, shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure.

The Lord Chancellor, with the concurrence of the Treasury may from time to time, by order, determine to what accounts and how intituled any such money or property as last aforesaid, whether paid, transferred, or deposited before or after the commencement of this Act, is to be carried, and modify all or any forms relating to such accounts; and the Governor and Company of the Bank of England, and all other companies, bodies corporate, and persons, shall make such entries and alterations in their books as may be directed by the Lord Chancellor, with the concurrence of the Treasury, for the purpose of carrying into effect any such order.

This section provides that all statutory rules as to practice or procedure may be modified by Rules of Court to make them more workable if needful under the Acts, preserving, however, intact the power of the Lord Chancellor, with the concurrence of the Treasury, to make rules as to the Paymaster General; but providing that rules as to payment, transfer, or deposit into, in or out of Court and dealings therewith shall be held rules of practice and procedure under the section. As to the forms of keeping the Court funds, the Lord Chancellor, with the Treasury, is to determine.

Orders and Rules to be laid before Parliament, and may be annulled on address from either House.

25. Every Order in Council and Rule of Court required by this Act to be laid before each House of Parliament shall be so laid within forty days next after it is made, if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session; and if an address is presented to Her Majesty by either House of Parliament, within the next subsequent forty days on which the said House shall have sat, praying that any such Rule or Order may be annulled, Her Majesty may thereupon by Order in Council annul the same; and the Rule or Order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

This section shall come into operation immediately on the passing of this Act. 38 & 39 VIC.
c. 77.

§§ 25, 26.

This clause is in substitution for the remaining portion of s. 68 of the principal Act, and in fact merely re-enacts in a slightly amended form the substance of the clause repealed.

26. The Lord Chancellor, with the advice and consent of the Judges of the Supreme Court or any three of them, and with the concurrence of the Treasury, may, either before or after the commencement of this Act, by order, fix the fees and per-centages (including the per-centage on estates of lunatics) to be taken in the High Court of Justice or in the Court of Appeal, or in any court created by any commission or in any office which is connected with any of those courts, or in which any business connected with any of those courts is conducted, or by any officer paid wholly or partly out of public moneys who is attached to any of those courts or the Supreme Court, or any Judge of those courts, including the masters and other officers in lunacy, and may from time to time by order increase, reduce, or abolish all or any of such fees and per-centages, and appoint new fees and per-centages to be taken in the said courts or offices or any of them, or by any such officer as aforesaid.

Fixing and
collection of
fees in High
Court and
Court of
Appeal.

Any Order made in pursuance of this section shall be binding on all the courts, offices, and officers to which it refers, in the same manner as if it had been enacted by Parliament.

All such fees and per-centages shall (save as otherwise directed by the Order) be paid into the receipt of Her Majesty's Exchequer and be carried to the Consolidated Fund, and with respect thereto the following rules shall be observed:

*See 28 & 29
Vict. c. 45.*

- (1.) The fees and per-centages shall, except so far as the Order may otherwise direct, be taken by stamps, and if not taken by stamps shall be taken, applied, accounted for, and paid over in such manner as may be directed by the Order. 32 & 33 Vict.
c. 91, ss. 19-23.
- (2.) Such stamps shall be impressed or adhesive, as the Treasury from time to time direct. 32 & 33 Vict.
c. 91, s. 21.
- (3.) The Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and

38 & 39 VIC.
c. 77.

§§ 26, 27.

32 & 33 Vict.
c. 91, s. 22.

particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for insuring the proper cancellation of stamps and for keeping accounts of such stamps.

(4.) Any document which ought to bear a stamp in pursuance of this Act, or any rule or order made thereunder, shall not be received, filed, used, or admitted in evidence unless and until it is properly stamped, within the time prescribed by the rules under this section regulating the use of stamps, but if any such document is through mistake or inadvertence received, filed, or used without being properly stamped, the Lord Chancellor or the Court may, if he or it shall think fit, order that the same be stamped as in such order may be directed.

32 & 33 Vict.
c. 91, s. 23.

(5.) The Commissioners of Inland Revenue shall keep such separate accounts of all money received in respect of stamps under this Act as the Treasury may from time to time direct, and, subject to the deduction of any expenses incurred by those Commissioners in the execution of this section, the money so received shall, under the direction of the Treasury, be carried to and form part of the Consolidated Fund.

Penalty for
counterfeiting,
&c., stamp.

(6.) Any person who forges or counterfeits any such stamp, or uses any such stamp, knowing the same to be forged or counterfeit, or to have been previously cancelled or used, shall be guilty of forgery, and be liable on conviction to penal servitude for a term not exceeding seven years, or to imprisonment with or without hard labour for a term not exceeding two years.

Order may
abolish fees,
&c.

An Order under this section may abolish any existing fees and per-centages which may be taken in the said courts or offices, or any of them, or by the said officers or any of them, but, subject to the provisions of any Order made in pursuance of this section, the existing fees and per-centages shall continue to be taken, applied, and accounted for in the existing manner.

Provisions as to
Lancaster Fee
Fund, and

27. Whereas by the Common Pleas at Lancaster Amendment Act, 1869, the fees taken by the prothonotaries and district prothonotaries in pursuance of that Act, are directed

to be carried to the credit of "the prothonotaries fee fund account of the county palatine of Lancaster," and certain salaries and expenses connected with the offices of the said prothonotaries and district prothonotaries are directed to be paid out of that account:

38 & 39 VIC.
c. 77.

§ 27.

salaries, &c., of
officers of courts
at Lancaster
and Durham.
32 & 33 Vict.
c. 37.

And whereas, on the twenty-fourth day of June one thousand eight hundred and seventy-four, there was standing to the credit of that account a sum of ten thousand seven hundred and fifty-five pounds consolidated three pounds per centum Bank annuities and one thousand eight hundred and ten pounds cash, or thereabouts:

And whereas the fees received in the Court of Pleas of Durham are applied in payment of disbursements connected with the office of the prothonotary of that court, and any surplus of such fees is paid into the receipt of Her Majesty's Exchequer, and any deficiency of the amount of the said fees to pay such disbursements is charged on the Consolidated Fund of the United Kingdom:

And whereas after the commencement of the principal Act, the jurisdiction of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham is by that Act transferred to and vested in the High Court of Justice, and it is expedient to make further provision respecting the expenses of those courts and the said stock and cash standing to the credit of the prothonotaries fee fund account of the county palatine of Lancaster:

Be it therefore enacted that,—

After the commencement of the principal Act there shall be paid out of moneys provided by Parliament such sums by way of salary or remuneration to the prothonotaries and district prothonotaries of the Court of Common Pleas at Lancaster and the Court of Common Pleas at Durham and their clerks, and such sums for rent, taxes, and other outgoings at their offices, as the Lord Chancellor, with the concurrence of the Treasury, may from time to time direct.

As soon as each prothonotary and district prothonotary of the Court of Common Pleas at Lancaster has accounted for and paid all fees and moneys which he shall have received by virtue of his said office, the Chancellor of the Duchy of Lancaster shall cause any security given by such officer in pursuance of section seventeen of the Common Pleas at Lancaster Amendment Act, 1869, to be cancelled, and delivered up, or otherwise discharged.

32 & 33 Vict.
c. 37.

38 & 39 VIC.
c. 77.

§§ 27, 28.

As soon as may be after the commencement of the principal Act the Treasury and the Chancellor of the duchy and county palatine of Lancaster shall ascertain the amount of stock and cash standing to the credit of the prothonotaries fee fund account of the county palatine of Lancaster, after paying thereout to the receiver general of the revenues of the duchy of Lancaster the amount of the fees remaining in the prothonotary's hands on the twenty-fourth day of October one thousand eight hundred and sixty-nine, and paid to that account in pursuance of section seventeen of the last-mentioned Act, and all other sums justly due to Her Majesty in right of Her said duchy and county palatine; and the Treasury shall by warrant direct the Governor and Company of the Bank of England to transfer to the Commissioners for the Reduction of the National Debt the amount of stock and cash so ascertained and either to cancel the stock in their books or otherwise dispose of the same as may be directed by the warrant; and the Governor and Company of the Bank of England shall transfer the stock and cash, and cancel or otherwise dispose of the stock according to the warrant, without any order from the Lord Chancellor or the Chancellor of the said duchy and county palatine or any other person.

The Commissioners for the Reduction of the National Debt shall apply all cash transferred to them in pursuance of this section in the purchase of Bank Annuities which shall be cancelled or otherwise disposed of in like manner as the said stock.

Annual account
of fees and
expenditure.
See 29 & 30
Vict. c. 101,
s. 7; 30 & 31
Vict. c. 122,
ss. 1—8; 32
& 33 Vict.
c. 91, s. 24.

28. The Treasury shall cause to be prepared annually an account for the year ending the thirty-first day of March, showing the receipts and expenditure during the preceding year in respect of the High Court of Justice and the Court of Appeal, and of any court, office, or officer, the fees taken in which or by whom can be fixed in pursuance of this Act.

Such account shall be made out in such form and contain such particulars as the Treasury, with the concurrence of the Lord Chancellor, may from time to time direct.

Every officer by whom or in whose office fees are taken which can be fixed in pursuance of this Act, shall make such returns and give such information as the Treasury may from time to time require for the purpose of enabling them to make out the said account.

The said account shall be laid before both Houses of Parliament within one month after the thirty-first day of March in each year, if Parliament is then sitting, or if not then within one month after the next meeting of Parliament.

38 & 39 VIC.
c. 77.

§§ 28, 29.

* These sections direct an annual account of the receipts and expenses of the High Court of Justice and the Court of Appeal and the courts and offices whose receipts in fees can be fixed, which is to be laid before Parliament.

29. Whereas fines and other moneys paid into the Court of Queen's Bench for Her Majesty's use are received by the Queen's coroner and attorney, and out of such moneys there is paid in pursuance of a writ of privy seal an annual sum of forty pounds, at the rate of ten pounds for every term, to the second Judge of the Court of Queen's Bench, and by section seven of the Act of the sixth year of King George the Fourth, chapter eighty-four, it is enacted that the said termly allowance of ten pounds shall continue to be paid to the said second Judge in addition to his salary :

Amendment
law as to
payments to
senior puisne
Judge of
Queen's Bench
and Queen's
coroner.

And whereas out of the said moneys there is also payable in pursuance of the said writ of privy seal an annual sum of ten pounds to the Queen's coroner and attorney :

And whereas it is expedient to determine such payments :

Be it therefore enacted as follows :

After the passing of this Act the said sums of forty pounds and ten pounds a year shall cease to be payable by the Queen's coroner and attorney out of the above-mentioned moneys.

So long as the person who on the first day of March one thousand eight hundred and seventy-five was the second Judge of the Court of Queen's Bench continues to be such second Judge, there shall be payable to him out of the Consolidated Fund of the United Kingdom the annual sum of forty pounds in addition to his salary, and that annual sum shall be payable to him by instalments of ten pounds at the like times at which the said termly allowance of ten pounds has heretofore been payable to him, or at such other times as the Treasury, with the consent of the Judge, may direct.

So long as the person who on the first day of March one thousand eight hundred and seventy-five was the Queen's coroner and attorney continues to hold that office, there shall be payable to him out of moneys provided by Parliament the

38 & 39 VIC.
c. 77.

§§ 29, 30.

annual sum of ten pounds, and such sum shall be payable to him at the like time at which the said annual sum of ten pounds has heretofore been payable to him, or at such other time as the Treasury, with the consent of such Queen's coroner or attorney, may direct.

S. 29 abolishes certain payments to the senior puisne judge of the Queen's Bench, and to the Queen's Coroner and Attorney, awarding compensation to the holders of the offices on the 1st of March, 1875.

Amendment of
35 & 36 Vict.
c. 44, as to the
transfer of
Government
securities to
and from the
Paymaster-
General on
behalf of the
Court of Chan-
cery and the
National Debt
Commissioners.

30. Whereas by section sixteen of "The Court of Chancery Funds Act, 1872," it is enacted that an order of the Court of Chancery may direct securities standing to the account of the Paymaster-General on behalf of the Court of Chancery to be converted into cash, and that where such order refers to Government securities such securities shall be transferred to the Commissioners for the Reduction of the National Debt in manner therein mentioned :

And whereas the said section contains no provision for the converse cases of the conversion of cash into securities and the transfer of securities from the said Commissioners to the account of the Paymaster-General on behalf of the Court of Chancery :

And whereas such conversion and transfer, and the other matters provided by the said section, can be more conveniently provided for by rules made in pursuance of section eighteen of the said Act ; and it is expedient to remove doubts with respect to the power to provide by such rules for the investment in securities of money in court, and the conversion into money of securities in court :

Be it therefore enacted as follows :

Section sixteen of "The Court of Chancery Funds Act, 1872," is hereby repealed.

Rules may from time to time be made in pursuance of section eighteen of "The Court of Chancery Funds Act, 1872," with respect to the investment in securities of money in court, and the conversion into money of securities in court, and with respect to the transfer to the Commissioners for the Reduction of the National Debt of Government securities ordered by the Court to be sold or converted into cash, and to the transfer by those Commissioners to the Paymaster-General for the time being, on behalf of the Court of Chancery, of Government securities ordered by the Court of Chancery to be purchased.

This section shall come into operation on the passing of this Act, and shall be construed together with "The Court of Chancery Funds Act, 1872," and shall be subject to any alteration in that Act made by or in pursuance of the principal Act or this Act.

38 & 39 VIC.
c. 77.

§§ 0- 32.

S. 30 provides that certain rules enacted by 35 & 36 Vict. c. 44, s. 16 (the Chancery Funds Act, 1872), whereby securities standing to the account of the Paymaster-General on behalf of the Court of Chancery were made convertible into cash, and made transferable to the Commissioners for the Reduction of the National Debt respectively, should be altered, and that in future rules should be made in pursuance of **s. 18** of the said Act, with respect to the investment in securities of money in Court, and conversion into money of securities in Court, and to the transfer to the Commissioners for the Reduction of the National Debt of Government Securities ordered by the Court to be sold or converted into cash, and to the transfer by the said Commissioners to the Paymaster-General on behalf of the Court of Chancery (which by the way is abolished, the Chancery Division being created in its stead), of Government Securities ordered by the Court to be purchased.

31. Whereas under the Lunacy Regulation Act, 1853, it is provided that there shall be a secretary to the visitors of lunatics therein mentioned, and it is expedient to abolish that office: Be it therefore enacted as follows:

Abolition of
secretary to
the visitors of
lunatics.—16 &
17 Vict. c. 70.

After the passing of this Act there shall cease to be a secretary to the visitors of lunatics.

The Treasury shall award, out of moneys provided by Parliament, to the person who holds at the passing of this Act the office of secretary to the visitors of lunatics such compensation, by way of annuity or otherwise, as, having regard to the conditions on which he was appointed to his office, the nature, salary, and emoluments of his office, and the duration of his services, they may think just and reasonable, so that the same be granted in accordance with the provisions and subject to the conditions contained in the Superannuation Act, 1859.

22 Vict. c. 26.

S. 31 abolishes the secretary to the visitors of lunatics with compensation.

32. Whereas by section nineteen of "The Bankruptcy Repeal and Insolvent Court Act, 1869," it is enacted as follows: "All dividends declared in any court acting under the Acts relating to bankruptcy or the relief of insolvent debtors which remain unclaimed for five years after the commencement of this Act, if declared before that commencement, and for five years after the declaration of the dividends if declared after the commencement of this Act, and all

Amendment of
32 & 33 Vict.
c. 83, s. 19, and
32 & 33 Vict.
c. 71, s. 116,
as to payment
of unclaimed
dividends to
persons
entitled.

38 & 39 VIC.
c. 77.

§§ 32, 33.

undivided surpluses of estates administered under the jurisdiction of such Court which remain undivided for five years after the declaration of a final dividend in the case of bankruptcy, or for five years after the close of an insolvency under this Act, shall be deemed vested in the Crown, and shall be disposed of as the Commissioners of Her Majesty's Treasury direct; provided that at any time after such vesting the Lord Chancellor may, if he thinks fit, by reason of the disability or absence beyond seas of the person entitled to the sum so vested, or for any other reason appearing to him sufficient, direct that the sum so vested shall be repaid out of moneys provided by Parliament, and shall be distributed as it would have been if there had been no such vesting."

32 & 33 Vict.
c. 71.

And whereas a similar enactment with respect to unclaimed dividends in bankruptcy was made by section one hundred and sixteen of "The Bankruptcy Act, 1869 :"

And whereas it is expedient to give to persons entitled to any such unclaimed dividends or other sums greater facilities for obtaining the same: Be it therefore enacted as follows :

32 & 33 Vict.
cc. 83, 71.

Any Court having jurisdiction in the matter of any bankruptcy or insolvency, upon being satisfied that any person claiming is entitled to any dividend or other payment out of the moneys vested in the Crown in pursuance of section nineteen of "The Bankruptcy Repeal and Insolvent Court Act, 1869," or of section one hundred and sixteen of "The Bankruptcy Act, 1869," may order payment of the same in like manner as it might have done if the same had not by reason of the expiration of five years become vested in the Crown in pursuance of the said sections.

This section shall take effect as from the passing of this Act.

S. 32 provides that certain clauses in 32 & 33 Vict. c. 83, viz., s. 19 (The Bankruptcy Repeal and Insolvent Court Act, 1869), and in 32 & 33 Vict. c. 71, viz., s. 116 (The Bankruptcy Act, 1869), forfeiting to the Crown unclaimed dividends and other monies, shall not be allowed to do injustice to persons proving to have been entitled to those forfeited monies.

Repeal.

33. From and after the commencement of this Act there shall be repealed—

(1.) The Acts specified in the Second Schedule to this Act, to the extent in the third column of that schedule mentioned, without prejudice to anything done or suffered before the said commencement under the enactments hereby repealed; also,

- (2.) Any other enactment inconsistent with this Act or the principal Act. 38 & 39 VIC.
c. 77.

§§ 33-35.

S. 33 is the Repeal Clause.

34. Whereas, by the seventy-seventh section of the principal Act, it is provided that, upon the occurrence of a vacancy in the office of any officer coming within the provisions of the said section, the Lord Chancellor, with the concurrence of the Treasury, may, in the event of such office being considered unnecessary, abolish the same, or may reduce the salary, or alter the designation or duties thereof, notwithstanding that the patronage thereof may be vested in an existing Judge; but that nothing in the said Act contained shall interfere with the office of marshal attending any commissioner of assize: And whereas it is expedient to add to the said section: Be it enacted, that, upon the occurrence of any vacancy coming within the provisions of the said section, an appointment shall not be made thereto for the period of one month without the assent of the Lord Chancellor, given with the concurrence of the Treasury; and, further, the Lord Chancellor may, with the concurrence of the Treasury, suspend the making any appointment to such office for any period not later than the first day of January one thousand eight hundred and *seventy-seven*, and may, if it be necessary, make provision in such manner as he thinks fit for the temporary discharge, in the meantime, of the duties of such office.

As to vacancies in any office within s. 77 of principal Act.

Now 1879; see note below.

In order to confirm the power, given by s. 77 of the principal Act, of abolishing offices found unnecessary, or modifying them, provision is made by this clause to prevent the immediate filling up of vacancies until it can be fairly considered whether they ought to be filled up or not, or how they ought to be modified, if at all. By s. 21 of 39 & 40 Vict. c. 59, the power of suspension given in the above section to the 1st Jan., 1877, is prolonged to the 1st of Jan., 1878, and by s. 6 of 40 Vict. c. 9, to the 1st of Jan., 1879.

35. Be it enacted, that any person who, at the time of the commencement of this Act, shall hold the office of chamber clerk shall be eligible at any time thereafter for appointment to the like office, anything in the principal Act to the contrary notwithstanding; and that, if any such person shall be so appointed after the commencement of this Act, he shall, if the salary assigned to such office by or under the principal Act be less than the salary received by him at the time of

Amendment of principal Act, s. 79, as to chamber clerks.

38 & 39 VIC.
c. 77.

§ 35.

the commencement of this Act, be entitled to receive a salary not less than that so formerly received by him, so long as he shall retain such office, but shall not be entitled to receive or claim any pension in respect of his service, unless the Treasury, in its absolute discretion, shall think fit to sanction the same.

This section makes some further provisions to confirm in practice s. 79 of the principal Act.

APPELLATE JURISDICTION ACT, 1876.

39 & 40 VICT. CAP. 59.

An Act for amending the Law in respect of the Appellate Jurisdiction of the House of Lords; and for other purposes. [11th August, 1876.] 39 & 40 VIC.
c. 59.
§§ 1-3.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

1. This Act may be cited for all purposes as "The Appellate Jurisdiction Act, 1876." Short title.

2. This Act shall, except where it is otherwise expressly provided, come into operation on the first day of November one thousand eight hundred and seventy-six, which day is herein-after referred to as the commencement of this Act. Commencement of Act.

Appeal.

3. Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the courts following ; that is to say, Cases in which appeal lies to House of Lords.

- (1.) Of Her Majesty's Court of Appeal in England ; and
- (2.) Of any Court in Scotland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute ; and
- (3.) Of any Court in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute.

39 & 40 VIC.
c. 59.

§§ 4-6.

Form of appeal
to House of
Lords.

4. Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal.

Attendance of
certain number
of Lords of
Appeal required
at hearing and
determination
of appeals.

5. An appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than three of the following persons, in this Act designated Lords of Appeal; that is to say,

(1.) The Lord Chancellor of Great Britain for the time being; and

(2.) The Lords of Appeal in Ordinary to be appointed as in this Act mentioned; and

(3.) Such Peers of Parliament as are for the time being holding or have held any of the offices in this Act described as high judicial offices.

Appointment of
Lords of Appeal
in Ordinary by
her Majesty.

6. For the purpose of aiding the House of Lords in the hearing and determination of Appeals, Her Majesty may, at any time after the passing of this Act, by letters patent appoint two qualified persons to be Lords of Appeal in Ordinary, but such appointment shall not take effect until the commencement of this Act.

A person shall not be qualified to be appointed by Her Majesty a Lord of Appeal in Ordinary unless he has been at or before the time of his appointment the holder for a period of not less than two years of some one or more of the offices in this Act described as high judicial offices, or has been at or before such time as aforesaid, for not less than fifteen years, a practising barrister in England or Ireland, or a practising advocate in Scotland.

Every Lord of Appeal in Ordinary shall hold his office during good behaviour, and shall continue to hold the same notwithstanding the demise of the Crown, but he may be removed from such office on the address of both Houses of Parliament.

There shall be paid to every Lord of Appeal in Ordinary a salary of six thousand pounds a year.

Every Lord of Appeal in Ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, shall by virtue and according to the date of his appointment be en-

39 & 40 VIC.
c. 59.

§§ 6-8.

titled during his life to rank as a Baron by such style as Her Majesty may be pleased to appoint, and shall during the time that he continues in his office as a Lord of Appeal in Ordinary, and no longer, be entitled to a writ of summons to attend, and to sit and vote in the House of Lords; his dignity as a Lord of Parliament shall not descend to his heirs.

On any Lord of Appeal in Ordinary vacating his office, by death, resignation, or otherwise, Her Majesty may fill up the vacancy by the appointment of another qualified person.

A Lord of Appeal in Ordinary shall, if a Privy Councillor, be a member of the Judicial Committee of the Privy Council, and, subject to the due performance by a Lord of Appeal in Ordinary of his duties as to the hearing and determining of appeals in the House of Lords, it shall be his duty, being a Privy Councillor, to sit and act as a member of the Judicial Committee of the Privy Council.

Supplemental Provisions.

7. Her Majesty may by letters patent grant to any Lord of Appeal in Ordinary, who has served for fifteen years, or is disabled by permanent infirmity from the performance of the duties of his office, a pension by way of annuity to be continued during his life equal in amount to the pension which might under similar circumstances be granted to the Master of the Rolls, in pursuance of the Supreme Court of Judicature Act, 1873.

Pension of Lord
of Appeal in
Ordinary.

Previous service in any office described in this Act as a high judicial office shall for the purposes of pension be deemed equivalent to service in the office of a Lord of Appeal in Ordinary under this Act.

The salary and pension payable to a Lord of Appeal in Ordinary shall be charged on and paid out of the Consolidated Fund of the United Kingdom, and shall accrue due from day to day, and shall be payable to the person entitled thereto, or to his executors and administrators, at such intervals in every year, not being longer than three months, as the Treasury may from time to time determine.

8. For preventing delay in the administration of justice, the House of Lords may sit and act for the purpose of hearing and determining appeals, and also for the purpose of Lords of Appeal in Ordinary taking their seats and the oaths

Hearing and
determination
of appeals
during proro-
gation of
Parliament.

39 & 40 VIC.
c. 59.

§§ 8-11.

during any prorogation of Parliament, at such time and in such manner as may be appointed by order of the House of Lords made during the preceding session of Parliament; and all orders and proceedings of the said House in relation to appeals and matters connected therewith during such prorogation, shall be as valid as if Parliament had been then sitting, but no business other than the hearing and determination of appeals and the matters connected therewith, and Lords of Appeal in Ordinary taking their seats and the oaths as aforesaid, shall be transacted by such House during such prorogation.

Any order of the House of Lords may for the purposes of this Act be made at any time after the passing of this Act.

Hearing and
determination
of appeals
during dissolu-
tion of Parlia-
ment.

9. If on the occasion of a dissolution of Parliament Her Majesty is graciously pleased to think that it would be expedient, with a view to prevent delay in the administration of justice, to provide for the hearing and determination of appeals during such dissolution, it shall be lawful for Her Majesty, by writing under her Sign Manual, to authorise the Lords of Appeal in the name of the House of Lords to hear and determine appeals during the dissolution of Parliament, and for that purpose to sit in the House of Lords at such times as may be thought expedient; and upon such authority as aforesaid being given by Her Majesty, the Lords of Appeal may, during such dissolution, hear and determine appeals and act in all matters in relation thereto in the same manner in all respects as if their sittings were a continuation of the sittings of the House of Lords, and may in the name of the House of Lords exercise the jurisdiction of the House of Lords accordingly.

Saving as to
fiat of Attorney
General.

10. An appeal shall not be entertained by the House of Lords without the consent of the Attorney General or other law officer of the Crown in any case where proceedings in error or on appeal could not hitherto have been had in the House of Lords without the fiat or consent of such officer.

Procedure
under Act to
supersede all
other pro-
cedure.

11. After the commencement of this Act error shall not lie to the House of Lords, and an appeal shall not lie from any of the Courts from which an appeal to the House of Lords is given by this Act, except in manner provided by

this Act, and subject to such conditions as to the value of the subject-matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords.

39 & 40 VIC.
c. 59.

§§ 11-14.

12. Except in so far as may be authorised by orders of the House of Lords an appeal shall not lie to the House of Lords from any Court in Scotland or Ireland in any case, which according to the law or practice hitherto in use, could not have been reviewed by that House, either in error or on appeal.

Certain cases
excluded from
appeal.

13. Nothing in this Act contained shall affect the jurisdiction of the House of Lords in respect of any error or appeal pending therein at the time of the commencement of this Act, and any such error or appeal may be heard and determined, and all proceedings in relation thereto may be conducted, in the same manner in all respects as if this Act had not passed.

Provision as
to pending
business.

Amendment of Acts.

14. Whereas by the Act of the session of the thirty-fourth and thirty-fifth years of the reign of Her present Majesty, chapter ninety-one, intituled "An Act to make further provision for the despatch of business by the Judicial Committee of the Privy Council," Her Majesty was empowered to appoint and did appoint four persons qualified as in that Act mentioned to act as members of the Judicial Committee of the Privy Council at such salaries as are in the said Act mentioned, in this Act referred to as paid Judges of the Judicial Committee of the Privy Council :

Amendment of
the Act of
34 & 35 Vict.
c. 91, relating
to the constitu-
tion of the
Privy Council.

And whereas the power given by the said Act of filling any vacancies occasioned by death, or otherwise, in the offices of the persons so appointed, has lapsed by efflux of time, and Her Majesty has no power to fill any such vacancies :

Be it enacted, that whenever any two of the paid Judges of the Judicial Committee of the Privy Council have died or resigned, Her Majesty may appoint a third Lord of Appeal in Ordinary in addition to the Lords of Appeal in Ordinary herein-before authorised to be appointed, and on

39 & 40 VIC.
c. 59.
§§ 14, 15. the death or resignation of the remaining two paid Judges of the Judicial Committee of the Privy Council Her Majesty may appoint a fourth Lord of Appeal in Ordinary in addition to the Lords of Appeal in Ordinary aforesaid ; and may from time to time fill up any vacancies occurring in the offices of such third and fourth Lord of Appeal in Ordinary

Any Lord of Appeal in Ordinary appointed in pursuance of this section shall be appointed in the same manner, hold his office by the same tenure, be entitled to the same salary and pension, and in all respects be in the same position as if he were a Lord of Appeal in Ordinary appointed in pursuance of the power in this Act before given to Her Majesty.

Her Majesty may by Order in Council, with the advice of the Judicial Committee of Her Majesty's Privy Council or any five of them, of whom the Lord Chancellor shall be one, and of the archbishops and bishops being members of Her Majesty's Privy Council, or any two of them, make rules for the attendance, on the hearing of ecclesiastical cases as assessors of the said Committee of such number of the archbishops and bishops of the Church of England as may be determined by such rules (a).

The rules may provide for the assessors being appointed for one or more year or years, or by rotation or otherwise, and for filling up any temporary or other vacancies in the office of assessor.

Any rule made in pursuance of this section shall be laid before each House of Parliament within forty days after it is made if Parliament be then sitting, or, if not then sitting, within forty days after the commencement of the then next session of Parliament.

If either House of Parliament present an address to Her Majesty within forty days after any such rule has been laid before such House, praying that any such rule may be annulled, Her Majesty may thereupon by Order in Council annul the same, and the rule so annulled shall thenceforth become void, but without prejudice nevertheless to the making of any other rule in its place, or to the validity of anything which may in the meantime have been done under any such rule.

Amendment of
the Supreme

15. Whereas it is expedient to amend the constitution of

(a) See rules, *post*, made in pursuance hereof, dated Nov. 28, 1876.

Her Majesty's Court of Appeal in manner herein-after mentioned: Be it enacted, that there shall be repealed so much of the fourth section of "The Supreme Court of Judicature Act, 1875," as provides that the ordinary Judges of Her Majesty's Court of Appeal (in this Act referred to as "the Court of Appeal") shall not exceed three at any one time.

39 & 40 VIC.
c. 59.

§ 15.

Court of Judicature Acts in relation to her Majesty's Court of Appeal.

In addition to the number of ordinary Judges of the Court of Appeal authorised to be appointed by "The Supreme Court of Judicature Act, 1875," Her Majesty may appoint three additional ordinary Judges of that Court.

The first three appointments of additional Judges under this Act shall be made by such transfer to the Court of Appeal as is in this section mentioned of three Judges of the High Court of Justice, and the vacancies so created in the High Court of Justice shall not be filled up, except in the event and to the extent herein-after mentioned.

Her Majesty may by writing, under her Sign Manual, either before or after the commencement of this Act, but so as not to take effect until the commencement thereof, transfer to the Court of Appeal from the following Divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division, such of the Judges of the said Divisions, not exceeding three in number, as to Her Majesty may seem meet, each of whom shall have been a Judge of any one or more of such Divisions for not less than two years previously to his appointment, and shall not be an ex-officio Judge of the Court of Appeal, and every Judge so transferred shall be deemed an additional ordinary Judge of the Court of Appeal in the same manner as if he had been appointed such Judge by letters patent. No Judge shall be so transferred without his own consent.

Every additional ordinary Judge of the said Court of Appeal appointed in pursuance of this Act shall be subject to the provisions of sections twenty-nine and thirty-seven of "The Supreme Court of Judicature Act, 1873," and shall be under an obligation to go circuits and to act as Commissioner under commissions of assize or other commissions authorised to be issued in pursuance of the said Act, in the same manner in all respects as if he were a Judge of the High Court of Justice.

There shall be paid to every additional ordinary Judge

39 & 40 VIC.
c. 59.

§§ 15, 16.

appointed in pursuance of this Act, in addition to the salary which he would otherwise receive as an ordinary Judge of the Court of Appeal, such sum on account of his expenses on circuit or under such commission as aforesaid as may be approved by the Treasury upon the recommendation of the Lord Chancellor.

Each of the Judges of the High Court of Justice who is in pursuance of this Act transferred to the Court of Appeal, by writing under the Sign Manual of Her Majesty, shall retain such officers as are attached to his person as such Judge, and are appointed and removeable by him at his pleasure, in pursuance of "The Supreme Court of Judicature Act, 1873," and the officers so attached shall have the same rank, and hold their offices by the same tenure, and upon the same terms and conditions, and receive the same salaries, and if entitled to pensions be entitled to the same pensions, and shall, as nearly as may be, perform the same duties as if the Judges to whom they are attached had not been transferred to the Court of Appeal.

Subject as aforesaid, the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, for the time being in force in relation to the appointment of ordinary Judges of Her Majesty's Court of Appeal, and to their tenure of office, and to their precedence, and to their salaries and pensions, and to the officers to be attached to such Judges, and all other provisions relating to such ordinary Judges, shall apply to the additional ordinary Judges appointed in pursuance of this section in the same manner as they apply to the other ordinary Judges of the said Court.

For the purpose of a transfer to the Court of Appeal under this section, service as a Judge in a court whose jurisdiction is transferred to the High Court shall be deemed to have been service as a Judge in any one or more of such Divisions of the High Court as are in this section in that behalf mentioned; and for the purpose of the pension of any person appointed under this Act an additional ordinary Judge of Appeal, service in the High Court of Justice, or in any Court whose jurisdiction is transferred to the High Court of Justice or to the Court of Appeal, shall be deemed to have been service in the Court of Appeal.

Orders in relation to conduct of business in

16. Orders for constituting and holding divisional courts of the Court of Appeal, and for regulating the sittings of the

Court of Appeal, and of the divisional courts of appeal, may be made, and when made, in like manner rescinded or altered, by the President (a) of the Court of Appeal, with the concurrence of the ordinary Judges of the Court of Appeal, or any three of them; and so much of section seventeen of "The Supreme Court of Judicature Act, 1875," as relates to the regulation of any matters subject to be regulated by orders under this section, and so much of any Rules of Court as may be inconsistent with any order made under this section, shall be repealed, without prejudice nevertheless to any rules of Court made in pursuance of the section so repealed, so long as such Rules of Court remain unaffected by orders made in pursuance of this section.

39 & 40 VIC.
c. 59.

§§ 16, 17.

her Majesty's
Court of
Appeal.

17. On and after the first day of December, one thousand eight hundred and seventy-six, every action and proceeding in the High Court of Justice, and all business arising out of the same, except as is hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single Judge (b), and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal, shall, so far as is practicable and convenient, be had and taken before the Judge before whom the trial or hearing of the cause took place: Provided nevertheless, that divisional courts of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by Rules of Court to be heard by a divisional court; and any such divisional court when held shall be constituted of two Judges of the Court and no more, unless the President of the Division to which such divisional court belongs, with the concurrence of the other Judges of such Division, or a majority thereof, is of opinion that such divisional court should be constituted of a greater number of Judges than two, in which case such court may be constituted of such number of Judges as the President, with such concurrence as aforesaid, may think expedient; nevertheless the decisions of a divisional court shall not be

Regulations as
to business of
High Court of
Justice and
divisional
courts of High
Court.

(a) See s. 6 of Act of 1875.

(b) See O. LVIIa., r. 2, in case a Judge is unable to hear by ceasing to be a Judge of the High Court.

39 & 40 VIC.
c. 59.

§§ 17-19.

invalidated by reason of such court being constituted of a greater number than two Judges; and

Rules of Court for carrying into effect the enactments contained in this section shall be made on or before the first day of December, one thousand eight hundred and seventy-six, and may be afterwards altered, and all Rules of Court to be made after the passing of this Act, whether made under "The Supreme Court of Judicature Act, 1875," or this Act, shall be made by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other Judges of the Supreme Court of Judicature, to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and all such Rules of Court shall be laid before each House of Parliament within such time and subject to be annulled in such manner as is provided by "The Supreme Court of Judicature Act, 1875."

There shall be repealed on and after the first day of December one thousand eight hundred and seventy-six so much of sections forty, forty-one, forty-two, forty-three, forty-four, and forty-six of "The Supreme Court of Judicature Act, 1873," as is inconsistent with the provisions of this section.

Power in
certain events
to fill vacancies
occasioned in
High Court of
Justice by
removal of
Judges to Court
of Appeal.

18. Whenever any two of the said paid Judges of the Judicial Committee of the Privy Council have died or resigned, Her Majesty may, upon an address from both Houses of Parliament, representing that the state of business in the High Court of Justice is such as to require the appointment of an additional Judge, fill up one of the vacancies created by the transfer hereinbefore authorised, by appointing one new Judge of the said High Court in any Division thereof; and on the death or retirement of the remaining two paid Judges of the said Judicial Committee, Her Majesty may, upon the like address, fill up in like manner another of the said vacancies, and from time to time fill up any vacancies occurring in the offices of Judges so appointed.

Attendance of

19. Where a Judge of the High Court of Justice has been

requested to attend as an additional Judge at the sittings of the Court of Appeal under section four of "The Supreme Court of Judicature Act, 1873," such Judge shall, although the period has expired during which his attendance was requested, attend the sittings of the Court of Appeal for the purpose of giving judgment or otherwise in relation to any case which may have been heard by the Court of Appeal during his attendance on the Court of Appeal.

39 & 40 VIC.
c. 59.

§§ 19-21.

Judges of High
Court of
Justice on
Court of
Appeal.

The "Supreme Court of Judicature Act, 1873," is here a manifest misprint for the "Supreme Court of Judicature Act, 1875," of which s. 4 is alluded to, s. 4 of the principal Act having nothing to say to the matter in hand.

20. Where by Act of Parliament it is provided that the decision of any Court or Judge the jurisdiction of which Court or Judge is transferred to the High Court of Justice is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any Judge thereof, to Her Majesty's Court of Appeal.

Amendment of
Judicature Acts
as to appeals
from High
Court of Justice
in certain
cases.

Under this clause, combined with Judicature Act, 1873, ss. 16, 19, and Divorce Acts, 20 & 21 Vict. c. 85, ss. 10, 55; 21 & 22 Vict. c. 108, s. 13; 23 & 24 Vict. c. 144, s. 1, there can be no appeal save to the full Court of the Probate, Divorce and Admiralty Division of the High Court in a case where a new trial has been refused by Judge Ordinary in divorce cause: *Westhead v. Westhead and Gordon*, 2 P. D. 1, 46 L. J. P. D. & A. 32; 25 W. R. 35; *Wallis v. Wallis*, 2 P. D. 141; 36 L. T. N. S. 161; 25 W. R. 387; *Gladstone v. Gladstone*, 2 P. D. 143; 25 W. R. 387; *Robinson v. Robinson*, 2 P. D. 77; 36 L. T. N. S. 122; 25 W. R. 388.

21. Whereas by section thirty-four of "The Supreme Court of Judicature Act, 1875," it is enacted that upon the occurrence of any vacancy in an office coming within the provisions of section seventy-seven of "The Supreme Court of Judicature Act, 1873," the Lord High Chancellor of Great Britain may, with the concurrence of the Treasury, suspend the making any appointment to such office for any period not later than the first day of January one thousand eight hundred and seventy-seven, and may, if it be necessary, make provision in such manner as he thinks fit for the temporary discharge in the meantime of the duties of such office, and it is expedient to extend the said period as hereinafter mentioned: Be it therefore enacted as follows:

Continuation
until 1st Jan.
1878 of s. 34
of 38 & 39
Vict. c. 77 as
to vacancies in
legal offices.

But see now
40 Vict. c. 9. s.
6, *post*, p. 149.

The said section shall be construed as if the first day of January one thousand eight hundred and seventy-eight were

39 & 40 VIC.
c. 59.

§§ 21-23.

Appointment of
deputy by
district
registrars.

therein inserted in lieu of the first day of January one thousand eight hundred and seventy-seven.

22. A district registrar of the Supreme Court of Judicature may from time to time, but in each case with the approval of the Lord Chancellor and subject to such regulations as the Lord Chancellor may from time to time make, appoint a deputy, and all acts authorised or required to be done by, to, or before a district registrar may be done by, to, or before any deputy so appointed : Provided always, that in no case such appointment shall be made for a period exceeding three months. This section shall come into force at the time of the passing of this Act.

Appointment
of vice-admiral,
judge, and
officers of Vice-
Admiralty
Court.

23. Whereas by "The Vice-Admiralty Courts Act, 1863," it is enacted, that "nothing in this Act contained shall be taken to affect the power of the Admiralty to appoint any vice-admiral, or any judge, registrar, marshal, or other officer of any Vice-Admiralty Court, as heretofore, by warrant from the Admiralty, and by letters patent issued under the seal of the High Court of Admiralty of England :"

And whereas since the commencement of the Supreme Court of Judicature Acts, 1873 and 1875, doubts have arisen with respect to the exercise of the said power of the Admiralty, and it is expedient to remove such doubts: Be it therefore enacted as follows :

Any power of the Admiralty to appoint or cancel the appointment of a vice-admiral, or a judge, registrar, marshal, or other officer of a Vice-Admiralty Court, may, after the passing of this Act, be exercised by some writing under the hands of the Admiralty, and the seal of the office of Admiralty, and in such form as the Admiralty from time to time direct.

Every appointment so made shall have the same effect, and every vice-admiral, judge, registrar, marshal, and other officer so appointed shall have the same jurisdiction, power, and authority, and be subject to the same obligation, as if he had been appointed before the commencement of the Supreme Court of Judicature Acts, 1873 and 1875, under the seal of the High Court of Admiralty of England.

"Admiralty" in this section means the Lord High Admiral, or the Commissioners for executing his office, or any two of such Commissioners.

24. Section sixteen of the Act for better enforcing Church Discipline, passed in the session of the third and fourth years of the reign of Her present Majesty, chapter eighty-six, and sections twenty, twenty-one, and fifty-five of the Supreme Court of Judicature Act, 1873, and section two of the Supreme Court of Judicature Act, 1875, shall be repealed (with the exception of so much of section two as declares the day on which that Act is to commence).

39 & 40 VIC.
c. 59.

§§ 24, 25.

Repeal of certain sections of the Church Discipline Act and of the Supreme Court of Judicature Acts.

This section is referred to in the notes to the principal Act, ss. 20, 21, and 55, which, having been formerly postponed by s. 2 of the Act of 1875, are absolutely repealed by this. S. 20 abolished appeals to the House of Lords and Judicial Committee from the High Court of Justice, and the Court of Appeal newly constituted; s. 21 gave power to Her Majesty to transfer the jurisdiction of the Judicial Committee to Her Majesty's Court of Appeal, and s. 55 provided arrangements for business of the Court of Appeal, and for having appeals transferred from the Judicial Committee.

25. In this Act, if not inconsistent with the context, the following expressions have the meaning hereinafter respectively assigned to them; that is to say,

Definitions:

"High judicial office" means any of the following offices; that is to say,

"high judicial office:"

The office of Lord Chancellor of Great Britain or Ireland, or of paid Judge of the Judicial Committee of the Privy Council, or of Judge of one of Her Majesty's superior courts of Great Britain and Ireland:

"Superior Courts of Great Britain and Ireland" means and includes,—

"superior courts:"

As to England, Her Majesty's High Court of Justice and Her Majesty's Court of Appeal, and the superior courts of law and equity in England as they existed before the constitution of Her Majesty's High Court of Justice; and

As to Ireland, the superior courts of law and equity at Dublin; and

As to Scotland, the Court of Session:

"Error" includes a writ of error or any proceedings in or by way of error.

"error."

Standing Orders of the House of Lords under this Act will be found hereafter, as also Order in Council under this Act as to Ecclesiastical cases.

SUPREME COURT OF JUDICATURE ACT, 1877.

40 VICT. CAP. 9.

40 VIC. c. 9.

§§ 1-3.

An Act for Amending the Supreme Court of Judicature Acts, 1873 and 1875. [24th April, 1877.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Construction
and short title
of Act.

1. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Acts, 1873 and 1875, and together with the said Acts may be cited as The Supreme Court of Judicature Acts, 1873, 1875, 1877, and this Act may be cited separately as "The Supreme Court of Judicature Act, 1877."

Appointment
of additional
Judge of High
Court of
Justice.

2. It shall be lawful for Her Majesty to appoint a Judge of the High Court of Justice in addition to the number of Judges of that Court authorised to be appointed by the Supreme Court of Judicature Acts, 1873 and 1875.

Position of
additional
Judge.

3. The Judge appointed in pursuance of this Act shall be in the same position as if he had been appointed a puisne Judge of the said High Court in pursuance of the Supreme Court of Judicature Acts, 1873 and 1875; and all the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, for the time being in force in relation to the qualification and appointment of puisne Judges of the said High Court, and to their tenure of office, and to their precedence, and to their salaries and pensions, and to the officers to be attached to the persons of such Judges, and all other provisions relating to such puisne Judges, or any of them, with

the exception of such provisions as apply to existing Judges only, shall apply to the additional Judge appointed in pursuance of this section in the same manner as they apply to the other puisne Judges of the said Court respectively. The Judge appointed in pursuance of this Act shall be attached to the Chancery Division of the said High Court, subject to such power of transfer as is in the Supreme Court of Judicature Act, 1873, mentioned.

40 VIC. c. 9.

§§ 3-6.

4. And whereas it is expedient that a uniform style should be provided for the ordinary Judges of the Court of Appeal and for the Judges of the High Court of Justice (other than the Presidents of Divisions): Be it enacted, that the ordinary Judges of the Court of Appeal shall be styled Lords Justices of Appeal, and the Judges of the High Court of Justice (other than the Presidents of Divisions) shall be styled Justices of the High Court.

Style of judges.

5. A puisne Judge of the High Court of Justice means for the purposes of this Act a Judge of the High Court of Justice other than the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively.

Definition of puisne judge.

6. Section thirty-four of the Supreme Court of Judicature Act, 1875, shall be construed as if the first day of January one thousand eight hundred and seventy-nine were therein inserted in lieu of the first day of January one thousand eight hundred and seventy-seven.

Continuation until 1st Jan. 1879 of s. 34 of 38 & 39 Vict. c. 77.

FIRST SCHEDULE.

RULES OF COURT.

RULES OF COURT (a).

NOTE.—[Where no other provision is made by the Act or these Rules, the present procedure and practice remain in force.]

ORDER I.

FORM AND COMMENCEMENT OF ACTION.

Ord. 1.

[RULE I.]

Actions and suits shall be instituted by "action."

1. All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.

True meaning of rule.

This rule provides that all actions hitherto commenced by writ, and all suits, &c., shall be instituted in the High Court of Justice by a proceeding to be called an action; this form of expression does not appear to convey the true meaning of the rule. What it means is, that all proceedings formerly known as actions in the Common Law Courts, and all those known as suits in Chancery or Probate or Admiralty or Divorce shall be called actions; and all other proceedings may be taken and made as they now are—the rule has nothing to say how actions, &c., are to be instituted. And that this is the meaning is shown by O. II., r. 1, which shows how actions are to be commenced or instituted, viz., by writ of summons, which it was decided formerly instituted the action likewise (b). Referring to O. LXII. it will be found that Criminal Proceedings, Proceedings on Crown side of Queen's Bench Division, those on the Revenue side of Exchequer Division and for Divorce and other Matrimonial causes are left untouched by the new practice.

(a) These Rules have been supplemented by several other sets, to be found *post*. (1) August, 1875; (2) October 28th, 1875, as to Court Fees; (3) December, 1875; (4) February, 1876; (5) April 22nd, 1876; (6) June, 1876; (7) December, 1876; (8) May, 1877; (9) June, 1877.

(b) *Alston v. Underhill*, 1 C. & M. 492; *Thompson v. Dicus*, id. 768.

2. With respect to interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Acts 1 & 2 Wm. 4, c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence.

RULES OF COURT.

Ord. 1.

[RULE II.]

Interpleader Acts, 1 & 2 Wm. 4, c. 58, and 23 & 24 Vict. c. 126, to apply to all actions and to all divisions of High Court.

Time at which defendant may apply.

How far law changed.

Former restriction.

Effect of new time for defendant's application.

Formerly held that unless entire demand within Act of Wm. 4, Courts could not interfere.

Rule relaxed.

The procedure under the Acts mentioned in this rule will be found in Lush's Practice, 3rd edition, 768 *et seq.* This rule makes only the necessary difference, that it introduces as the time at which a defendant is entitled to apply "any time after being served with a writ of summons" and before delivering a defence," the old law being that the application should be made after declaration and before plea, which are now abolished.

The law as to interpleader is unchanged by this rule, save that proceedings may be taken as under the Acts named in any division of the High Court, and the time at which application may be made is altered in some points. It was formerly restricted to cases in which defendant had actually been declared against (*a*) for the recovery of some specific chattel (*b*) or its value, or for a debt or demand in the nature of a debt as distinguished from an action for damages (*c*) in assumpsit or debt, detinue or trover, the restriction in the nature of the claim remains; but now, since the statement of claim need not be filed, a defendant may apply at any time after service of the writ of summons and before defence delivered. This, however, must in its effect largely interfere with the restriction on the nature of the action, for the nature cannot by the mere writ be very closely defined, as it would by declaration formerly, and even then there were cases not free from doubt, *e.g.*—it had at one time been held that if any part of the demand was not within the Act of 1 & 2 Wm. 4, c. 58, the Courts could not interfere, so that where a count in case was added to a count in trover a rule was refused (*d*); but this rule seems to have been relaxed (*e*), and it was reasonably clear that for a considerable time back an interpleader issue might be directed as to part of an entire sum of money where part only was claimed by the third party (*f*). Where the action had been stayed by injunction previously the rule was refused (*g*).

The following are the Acts and sections mentioned in this rule:—

1 & 2 WILL. IV. CAP. 58.

An Act to enable Courts of Law to give Relief against adverse Claims made upon Persons having no Interest in the Subject of such Claims.

[20th October, 1831.]

WHEREAS it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also

(*a*) *Parker v. Linnett*, 2 D. P. C. 562.

(*b*) Trover for title deeds was held not within the Act: *Smith v. Wheeler*, 1 Gale, 163.

(*c*) *Walter v. Nicholson*, 6 D. P. C. 517.

(*d*) *Lawrence v. Mathews*, 5 D. P. C. 149.

(*e*) *Per Pollock*, C. B., in *Winter v. Bartholomew*, 25 L. J. Ex. 62.

(*f*) *Best v. Hayes*, 1 H. & C. 718; 32 L. J. Ex. 129; *Tanner v. European Bank*, L. R. 1 Ex. 261.

(*g*) *Arayne v. Lloyd*, 1 Bing. N. C. 720.

RULES OF
COURT.

Ord. 1.

[RULE II.]

Upon application by a defendant in an action of assumpsit, &c., stating that the right in the subject matter is in a third party, the Court may order such third party to appear and maintain or relinquish his claim, and in the meantime stay proceedings in such action.

claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in Equity against the plaintiff and such third party, usually called a Bill of Interpleader, which is attended with expense and delay; for remedy thereof be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That upon application made by or on the behalf of any defendant sued in any of His Majesty's Courts of law at Westminster, or in the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration, and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject-matter of the action in such manner as the Court (or any Judge thereof) may order or direct, it shall be lawful for the Court, or any Judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable.

Judgment and decision to be final.

II. And be it further enacted, That the judgment in any such action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.

If such third party shall not appear, &c., the Court may bar his claim against the original defendant.

III. And be it further enacted, That if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving nevertheless the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable.

Proviso as to orders made by a single Judge.

IV. Provided always, and be it further enacted, That no order shall be made in pursuance of this Act by a single Judge of the Court of Pleas of the said County Palatine of Durham who shall not also be a Judge of one of the said Courts at Westminster, and that every order to be made in pursuance of this Act by a single Judge not sitting in open Court shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single Judge.

If a judge thinks the matter more

V. Provided also, and be it further enacted, That if upon application to a Judge, in the first instance or in any later stage of the proceedings, he

shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court; and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by Rule of Court, instead of the order of a Judge.

RULES OF
COURT.

Ord. 1.

[RULE II.]

VI. And whereas difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers; be it therefore further enacted, That when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by Rule of Court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court.

fit for the decision of the Court, he may refer it.

For relief of sheriffs and other officers in execution of process against goods and chattels.

VII. And be it further enacted, That all rules, orders, matters, and decisions to be made and done in pursuance of this Act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by fieri facias or capias ad satisfaciendum, adapted to the case, together with the costs of such entry, and of the execution if by fieri facias; and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the Court.

Rules, orders, &c., made in pursuance of this Act may be entered of record, and made evidence.

Costs.

Writs.

Sheriff's fees.

VIII. And whereas by a certain Act made and passed in the last session of Parliament, intituled *An Act to improve the Proceedings in Prohibition and on Writs of Mandamus*, it was among other things enacted, that it should be lawful for the Court to which application may be made for any such writ of mandamus as is therein in that behalf mentioned to make rules and orders calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of such writ and payment of the costs of the application, and upon the appearance of such other person in compliance with such rules, or in default of appear-

Upon any application under 1 Wm. 4, c. 21, and this Act, the Court to exercise such powers and make such rules as are given by or mentioned in this Act.

RULES OF
COURT.**Ord. 1.**
[RULE II.]

ance after service thereof, to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as were or might be given or mentioned by or in any Act passed or to be passed during that present Session of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims: And whereas no such Act was passed during the then present Session of Parliament; be it therefore enacted, That upon any such application as is in the said Act and hereinbefore mentioned, it shall be lawful for the Court to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as are given or mentioned by or in this present Act.

1 & 2 VICT. CAP. 45.

An Act (inter alia) 'to extend the Jurisdiction of the Judges of the Superior Courts of Common Law.

Any judge may exercise such powers for the relief of sheriffs, &c., as may by virtue of 1 & 2 Wm. 4, c. 58, s. 6, be exercised by the several Courts.

Sect. 2. 'And whereas by another Act passed in the second year of the reign of his late Majesty King William the Fourth, intituled, *An Act to enable the Courts of Law to give Relief against adverse Claims made upon Persons having no Interest in the Subject of such Claims*, provision is made for the relief of sheriffs and other officers concerned in the execution of process issued out of any of His Majesty's Courts of Law at Westminster, or the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, against goods and chattels by reason of claims made to such goods and chattels, but such relief can only be given by Rule of Court: and whereas it is expedient that a single Judge should possess the power of giving relief in that respect,' be it further enacted, That it shall be lawful for any Judge of the said Courts of Queen's Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those Courts, or for any Judge of the said Court of Common Pleas of the County Palatine of Lancaster, or Court of Pleas of the County Palatine of Durham (being also a Judge of one of the said three Superior Courts,) with respect to process issued out of the said Courts of Lancaster and Durham respectively, to exercise such powers and authorities for the relief and protection of the sheriff or other officer as may by virtue of the said last-mentioned Act be exercised by the said several Courts respectively, and to make such order therein as shall appear to be just, and the costs of such proceedings shall be in the discretion of such Judge.

COMMON LAW PROCEDURE ACT, 1860.

23 & 24 VICT. CAP. 126.

Interpleader may be granted though titles have not a common origin.

Sect. 12. Where an action has been commenced in respect of a common law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from any one of the Superior Courts, or from the Court of Common Pleas at Lancaster, or the Court of Pleas at Durham, and the defendant in such action, or the sheriff or other officer, has applied for relief under the provisions of an Act made and passed in the Session of Parliament held in the first and second years of the reign of his late Majesty King William the Fourth, intituled, *An Act to enable Courts of Law to give relief against Adverse Claims made upon Persons having no Interest in the Subject of such Claims*, it shall be lawful for the Court or a Judge to whom such application is made, to exercise all the powers and authorities given to them by this Act and the hereinbefore mentioned Act

passed in the Session of Parliament held in the first and second years of the reign of his late Majesty King William the Fourth, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another.

RULES OF
COURT.

Ord. 1.

[RULE II.]

Sect. 13. When goods or chattels have been seized in execution by a sheriff or other officer under process of the above-mentioned Courts, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels, by way of security for a debt, the Court or a Judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or Judge may seem just.

Court or Judge may direct sale of goods seized in execution.

Sect. 14. Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or Judge wherever, from the smallness of the amount in dispute or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just.

Power to Court or Judge to decide summarily in certain cases.

Sect. 15. In all cases of interpleader proceedings, where the question is one of law, and the facts are not in dispute, the Judge shall be at liberty at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the Court.

Special case may be stated where facts undisputed.

Sect. 16. The proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under "The Common Law Procedure Act, 1852" (a); and error may be brought upon a judgment upon such case; and the provisions of "The Common Law Procedure Act, 1854" (b), as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this Act.

Proceedings on special case in Court below and in error.

Sect. 17. The judgment in any such action or issue as may be directed by the Court or Judge in any interpleader proceedings, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from or under them.

Judgment and decision when to be final.

Sect. 18. All rules, orders, matters, and decisions to be made and done in interpleader proceedings under this Act (excepting only any affidavits) may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment in the Superior Courts of Common Law.

Rules, Orders, &c., made in interpleader proceedings may be entered of record, and made evidence.

It has been held under this rule that no appeal lies from an order on an interpleader summons, summarily disposed of under 14th section of the Common Law Procedure Act of 1860 (c). But notwithstanding this case,

Whether appeal lies from order on interpleader summons.

(a) Sects. 46-48.

(b) Sect. 32.

(c) *Dodds v. Shepherd*, 1 Ex. D. 75; 45 L. J. Ex. D. 457; 34 L. T. N. S. 358; 24 W. R. 322.

RULES OF
COURT.

Ord. 1.

[RULE II.]

[RULE III.]

Other proceed-
ings unchanged
in practice.

which was quoted to them, the Court of Appeal have held that, where a Judge has ordered judgment to be entered on an interpleader issue after motion for judgment before him, an appeal lies under the Act of 1873, s. 19 and O. XL., r. 4, notwithstanding this rule and the provision in Common Law Procedure Act, 1860, s. 17, before noticed (a).

3. All other proceedings in and applications to the High Court may, subject to these Rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Act had not been passed.

It has been held that among the "all other proceedings" are included proceedings on an award (b). See also O. LIII., r. 2.

Ord. 2.

ORDER II.

WRIT OF SUMMONS AND PROCEDURE, &c.

[RULE I.]

Action com-
menced by writ
of summons
indorsed.

1. Every action in the High Court shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned.

The old rule was that provided by 15 & 16 Vict. c. 76, s. 2.

Former law as
to indorse-
ments.

This statute, by ss. 6 and 7, required the common law indorsements of certain formal matters, and s. 8, where the writ was for the payment of any debt, required statement of the amount of the debt and of what the plaintiff's attorney claimed for costs of writ, copy, and service, and attendance to receive debt and costs, and gives form. The object in requiring this indorsement was that the defendant might stay the proceedings by paying the amount claimed within the four days allowed, in other respects it did not limit the plaintiff (c). The want of such indorsement was held to be an irregularity (d), which might, however, have been amended at the plaintiff's cost.

Special indorse-
ment under 15
& 16 Vict. c.
76, s. 25.

That statute also, by s. 25, provided a special indorsement in the form set out, but only where the claim was for debt or liquidated demand, in money (e), compare *post*, O. III., r. 6; but none of these indorsements can for a moment be compared with that required by this rule, which, in fact, amounts to the prayer of a bill, or may do so; it exceeds in complexity very much even the particulars of demand which that Act, s. 25, required to be furnished upon money counts, and which is also, by O. III., r. 6, continued by this Act in the like case.

(a) *Witt v. Parker*, 46 L. J. (App.) Q. B. D. 450; 36 L. T. N. S. 538; 25 W. R. 518; W. N. 1877, 118.

(b) *Re an Arbitration between Robert Phillips and John Brooke Gill*, 1 Q. B. D. 78; 45 L. J. Q. B. D. 136; 24 W. R. 158.

(c) *Per Alderson, B.*, in *Jacquot v. Bourra*, 5 M. & W. 156.

(d) *Truslove v. Whitechurch*, 1 Scott, N. R. 415; 1 M. & G. 426; 8 Dowl. P. C. 837.

(e) *Rogers v. Hunt*, 10 Ex. 474.

The indorsement is, by **O. III., r. 2**, made as little inconvenient as may be, but at the same time the indorsement is by that rule rendered of very little use : see the Rule.

Under this rule and the Rule **O. I., r. 1**, proceedings in the Probate Division can, it seems, no longer be commenced by citation. Proceedings were taken in *Dyke v. Shepherd*, in the Probate Division, at the suit of the Queen's Proctor, for revocation of a grant of letters of administration obtained by a person claiming to be a sister of the deceased. Motion was made for revocation and for a grant of letters to the Solicitor for the Treasury on proof of advertisements of citation. Held that the proceedings were altogether erroneous in point of form, for that **O. I., r. 1** directs that all suits hitherto commenced by citation or otherwise, in Court of Probate shall be instituted by action, and this rule directs every action to be commenced by writ of summons, &c. The motion was therefore adjourned (a).

For concurrent writs, see **O. VI.** For renewal of writs, **O. VIII.** For amendment of writ, see **O. XXVII., r. 11**, otherwise **r. 6** of Feb., 1876.

2. Any costs occasioned by the use of any more prolix or other forms of writs, and of indorsements thereon, than the forms hereinafter prescribed, shall be borne by the party using the same, unless the Court shall otherwise direct.

3. The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in Form No. 1, in Part I. of Appendix (A) hereto, with such variations as circumstances may require.

The following rule has here been introduced by Rules of the Supreme Court, June, 1876 :—

3A. Forms 2 and 3 in Part I. of Appendix A to "The Rules of the Supreme Court" shall be read as if the words "by leave of the Court or a Judge" were not therein.

See these forms, *post*.

This alteration was made after a matter of *Baker v. Turner*, alias *Bacon v. Turner* (b), had been brought before the Court. There leave had been given to serve a foreigner out of the jurisdiction with notice of writ of summons, under **O. XI., r. 1**, amended by the omission of the words now ordered to be omitted, on the ground that the plaintiff, after having obtained leave to issue and serve a writ or notice in lieu thereof out of the jurisdiction, may proceed to sign judgment by default without further leave. It had also been remarked in a case of *Scott v. The Royal Wax Candle Co.* (c), that the Form 3 of Appendix A, Part I., First Schedule, Rules of Court, 1875, is calculated to mislead a defendant into supposing that such further leave is necessary and ought to be amended, whence there was

(a) 20 S. J. 272.

(b) 24 W. R. 637 ; sub nom. *Bacon v. Turner*, 3 Ch. D. 275 ; 34 L. T. N. S. 647.

(c) 1 Q. B. D. 404 ; 45 L. J. Q. B. D. 586 ; 34 L. T. N. S. 683 ; 24 W. R. 668.

RULES OF COURT.

Ord. 2.

[RULE I.]

Proceedings in Probate Division no longer by citation.

[RULE II.]

Costs of more prolix forms to be borne by party using them.

[RULE III.]

Form of writ of summons.

[RULE IIIA.]

RULES OF
COURT.

Ord. 2.

[RULE IV.]

No such writ
for service out
of jurisdiction
to be issued
without leave.

15 & 16 Vict.
c. 76, s. 18.
As to actions
against British
subjects re-
siding out of
the jurisdiction
of Superior
Courts.

no further doubt that the words were simply mischievous, requiring a motion to allow of their being specially omitted, and being of no use when retained (*a*).

4. No writ of summons for service out of the jurisdiction or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a Court or Judge.

A clause existed in the repealed **Sched. 1** to the principal Act providing for service of summons, or notice in lieu thereof, out of the jurisdiction by leave of the Court, or a Judge, and it may be well to give the practice on this head as it stood before the passing of these Acts. The Common Law Rule was founded on the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, ss. 18, 19, the first of which provided that: "In case any defendant, being a British subject, is residing out of the jurisdiction of the said Superior Courts in any place, except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the Schedule (*A*) to this Act annexed, marked No. 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said Superior Courts, and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the Court or Judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said Courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such Court or Judge may seem fit, having regard to the time allowed to the defendant to appear being reasonable, and to the other circumstances of the case: Provided always, that the plaintiff shall, and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry or before one of the masters of the said Superior Courts in the manner hereinafter provided, according to the nature of the case, as such Court or Judge may direct; and the making of such proof shall be a condition precedent to such judgment."

"Cause of
action which
arose within
the jurisdic-
tion."

The words "cause of action which arose within the jurisdiction" gave rise to a great discrepancy between the Courts of Common Law in their construction of them, the Court of Queen's Bench determining that they meant the entire cause of action, *e.g.*, in the case of an action of contract both the making of the contract and the breach (*b*): the Common Pleas that it meant "the act on the part of the defendant which gives the plaintiff the cause of complaint" (*c*), though even the Common Pleas have not been in all respects constant to this view. Thus the clause was held not to apply to an action on an Irish judgment for debt and costs, though the debt was contracted in England (*d*);

(*a*) See *post*, note to **O. XIII.**, r. 6; *Scott v. Royal Wax Candle Co.*, *supra*.

(*b*) *Allhusen v. Malgarejo*, L. R. 3 Q. B. 340; *Cherry v. Thomson*, L. R. 7 Q. B. 573.

(*c*) *Jackson v. Spittal*, L. R. 5 C. P. 542; *Horwood v. Wood*, 13 W. R. 94.

(*d*) *Thelwall v. Yelverton*, 16 C. B. N. S. 813.

RULES OF COURT.

Ord. 2.

[RULE IV.]

Settlement of question.

Where writ involved as well matter arising without as within jurisdiction.

Mode of opposing action improperly brought on matter not within jurisdiction.

15 & 16 Vict. c. 76, s. 19. As to actions against foreigners residing out of jurisdiction of Superior Courts.

though this case was determined, no doubt, on the principle that the debt was merged in the judgment, but that merger ought, it would seem, in principle to be confined to Ireland; and the Exchequer being divided between both opinions (*a*), the matter was finally fully argued in the Common Pleas on January 21st, 1874, and the case stood over for judgment, in order that, if possible, the Judges might come to an agreement, when the majority of the Judges agreed to abide by the view entertained by the Common Pleas (*b*), and thus the matter would appear to be settled. In one case, a writ being issued for service out of the jurisdiction under s. 18 of the Common Law Procedure Act, 1852, the defendant applied on affidavit to set it aside, on the ground that the cause of action did not arise within the jurisdiction. The Court, not being satisfied that it was not the intention of the plaintiff to sue for matter not arising within the jurisdiction, made an order to set the writ aside, unless the plaintiff would give an undertaking to prove a cause of action arising within the jurisdiction, and to confine himself to that cause of action (*c*).

The mode of opposing an action improperly brought on a cause of action out of the jurisdiction under this clause was, by moving to set aside the writ, on the ground that the cause of action arose out of the jurisdiction (*d*), for it has been held that the writ was not irregular (*e*); but though it has been held that the writ was not irregular on account of the cause of action not arising within the jurisdiction, yet none of the procedure given by the Act could be prosecuted if opposed in such a case within proper time (*f*), or if such prosecution were permitted by error, it would be set aside on cause shown in due time, though not after unreasonable delay (*g*), or after sanction by the defendant (*h*).

By s. 19 of the same statute it was further provided that: "In any action against a person residing out of the jurisdiction of the said Courts, and not being a British subject, the like proceedings may be taken as against a British subject resident out of the jurisdiction, save that in lieu of the form of writ of summons in the Schedule A to this Act annexed, marked No. 2, the plaintiff shall issue a writ of summons according to the form contained in the Schedule A, marked No. 3, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said schedule, also marked No. 3, and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and by leave of the Court or Judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon."

Under this clause a writ of summons having been served on defendant resident abroad with notice indorsed allowing seven days for payment of sum claimed, the time limited for appearance being fourteen days, the Court refused leave to the plaintiff to proceed under this section, and held that the irregularity was not waived by a subsequent admission of service and offer to settle (*i*).

(*a*) *Sichel v. Borch*, 2 H. & C. 954; 33 L. J. Ex. 179; *Durham v. Spence*, L. R. 6 Ex. 46.

(*b*) *Vaughan v. Weldon*, L. R. 10 C. P. 47.

(*c*) *Diamond v. Sutton*, L. R. 1 Ex. 130.

(*d*) *Binet v. Picot*, 4 H. & N. 365. See now *Preston v. Lamont*, 1 Ex. D. 361; 45 L. J. Ex. D. 797; 35 L. T. N. S. 341; 24 W. R. 928.

(*e*) *Bayne v. Slack*, 3 C. B. N. S. 363; *Hutton v. Whitehouse*, 1 H. & N. 32; *Forbes v. Smith*, 10 Ex. 717.

(*f*) *Binet v. Picot*, 4 H. & N. 365.

(*g*) *Hutton v. Whitehouse*, 1 H. & N. 32.

(*h*) *Bayne v. Slack*, 3 C. B. N. S. 363.

(*i*) *Galli v. Mongruel*, L. R. 1 C. P. 46.

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[RULE IV.]

In Chancery Consolidated Orders, Order 10, Rule 7. Service of copy of bill and of interrogatories out of jurisdiction. Art. 1.

Art. 2.

Art. 3.

Art. 4.

Appearance may be entered for such defendant.

Decisions of Lord Westbury limiting Court's power.

Reversed by Court of Appeal.

Defendant's course.

Evidence.

In Chancery, however, the practice in these cases was founded on the 10th of the Consolidated Orders, the 7th rule of which provides that, where a defendant in any suit is out of the jurisdiction of the Court, 1. The Court upon application, supported by such evidence as shall satisfy the Court in what place or country such defendant is or may probably be found, may order that a copy of the bill under statute 15 & 16 Vict. c. 36, s. 3, and if an answer is required, a copy of the interrogatories may be served on such defendant, in such place or country, or within such limits as the Court shall think fit to direct.

2. Such order shall limit a time after such service, within which such defendant is to appear to the bill, such time to depend on the place or country within which the copy of the bill is to be served. And where an answer is required, such order shall also limit a time within which such defendant is to plead answer or demur, or obtain from the Court further time to make his defence to the bill.

3. At the time when such copy of the bill shall be served, the plaintiff shall also cause such defendant to be served with a copy of the order, giving the plaintiff leave to serve such copy of the bill.

4. And if upon the expiration of the time for appearing it be shown to the satisfaction of the Court that such defendant was duly served with such copy of the bill, and with a copy of the order, the Court may, upon the application of the plaintiff, order an appearance to be entered for such defendant.

Under this rule Lord Westbury, in *Cookney v. Anderson* (a), *Foley v. Maillardet* (b), and *Samuel v. Rogers* (c), held that the Court could only order service abroad in cases within its jurisdiction, under 2 Wm. 4, c. 33, or 4 & 5 Wm. 4, c. 82, that is to say, in suits relating to land in England, or concerning any charge, lien, judgment, or incumbrance thereon, or concerning any money vested in any Government or public stocks, or shares in public companies, or concerns, or the dividends or produce thereof. This decision, or series of decisions, however, was seriously considered and deliberately reversed by the Court of Appeal in the case of *Drummond v. Drummond* (d), in which it was determined that under this general order the Court had power to order service abroad in any suit whatever, and direct the suit to proceed; for before the order for which this was substituted, viz., the 33rd Order of May 8th, 1845, a subpoena might have been served abroad; but unless the defendant chose to appear, the suit could not have been proceeded with as against him. This 33rd Order of May 8th, 1845, was framed under the authority of 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52 (Acts for facilitating the administration of justice in the Court of Chancery, 1841 and 1842). As to the discretion of the Court in allowing service abroad under these Orders, see cases (e). The defendant might enter a conditional appearance, and apply to have the order allowing foreign service, &c., to be set aside, by showing it was not in accordance with the rules of the Court, or that the allegations in the bill, on the strength of which it was made, were untrue (f). As to what evidence was necessary to support an application for foreign service, see cases (g).

(a) 1 De G. J. & S. 365.

(b) 1 De G. J. & S. 389.

(c) 1 De G. J. & S. 396.

(d) 2 L. R. Ch. 32.

(e) *Drummond v. Drummond*, 2 L. R. Ch. 32, 37, 46; *Steel v. Stuart*, 1 H. & M. 792; *Innes v. Mitchell*, 1 De G. & J. 423; *Micklan v. Campbell*, 24 Beav. 100; *Cook v. Wood*, 7 W. R. 424.

(f) *Haywarden v. Dunlop*, 2 Dr. & Sm. 155; see *Maclean v. Dawson*, 27 Beav. 25; 4 De G. & J. 150; see however *Tracey v. Smith*, 11 W. R. 458.

(g) *Blenkinsop v. Blenkinsop*, 2 Ph. 1; *Fieske v. Buller*, 7 Beav. 581; *Preston v. Dickinson*, 9 Jur. 919; *Whitmore v. Ryan*, 4 Ha. 612; *Joseph v. Tindall*, 13 L. J. Ch. 23.

It seems, therefore, on the whole that as regards Chancery the new rule is rather a retrograde step, though it will probably give an opportunity for almost any suit which could with propriety be brought, for it allows service abroad wherever the suit is properly cognizable against any defendant as well as wherever the cause of action arose, within the jurisdiction.

The former general order in Chancery in terms only applied to service of the bill and interrogatories on a defendant out of the jurisdiction, and formerly service of subsequent process used to be refused; thus a traversing note was not allowed to be served out of the jurisdiction (*a*). But in later times the Court has become more liberal; but special leave was still required to serve notice of motion abroad (*b*), and notice of motion for a decree might before these Acts be served by leave abroad (*c*), or notice of a decree under 15 & 16 Vict. c. 86, s. 42 (*d*), or notice of replication (*e*). So in suits instituted otherwise than by bill, notice of proceedings might be served abroad; thus suit instituted by administration summons (*f*), though this was held otherwise (*g*); but not a proceeding which is not a suit, *e.g.*, a petition under the Trustee Relief Act (*h*). However, service abroad of a winding-up petition has been ordered (*i*).

It appears therefore that as to all these matters the practice, so far as not expressly altered by rules, remains the same as before the Act, under the provisions of s. 73 of the principal Act.

As to service on one for several out of the jurisdiction, see (*k*). Service on a husband out of the jurisdiction has been held good service on the wife (*l*); but where the husband was of unsound mind, both he and the wife were served (*m*), and the plaintiff was put under terms not to apply to enter an appearance for the unsound husband, without at the same time showing to the Court the state of his mind. But with this restriction the unsound person was served, as were also infants (*n*) out of the jurisdiction. As to service on a company out of the jurisdiction see *Lewis v. Baldwin* (*o*), as to service of letter missive on a peer out of the jurisdiction (*p*). It is submitted that letters missive are now abolished, and that peers, like others, must be served with writs of summons. The service abroad need not have been limited to any particular spot; thus leave was given to serve in Scotland (*q*), in the Grand Duchy of Baden (*r*), or the like. With reference to this rule see also O. II., r. 5, and Forms 2 and 3, Part I., Appendix A., and more especially O. XI.

As to the practice under the rule in question, several cases of some

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[RULE IV.]

As to Chancery. Former order in terms confined to bill and interrogatories. Practice of late enlarged.

Service abroad generally confined to suits.

Service on one for others.

On company out of jurisdiction.

Service abroad not closely limited in space.

(*a*) *Anon.*, 11 Jur. 28; *Anderson v. Stather*, *ibid.* 96.

(*b*) *Weguelin v. Lawson*, 8 L. T. N. S. 763; *Hasluck v. Stewart*, 6 Sim. 321; *Green v. Pledger*, 3 Ha. 165; *Haywarden v. Dunlop*, 2 Dr. & Sm. 155; *Godson v. Cook*, 7 Sim. 519.

(*c*) *Meek v. Ward*, 10 Ha. App. lv.; *Middleton v. Chichester*, 1 N. R. 255.

(*d*) *Strong v. Moore*, 22 L. J. Ch. 917; *Chalmers v. Laurie*, 10 Ha. App. xxvii.; *Maybery v. Brooking*, 7 De G. M. & G. 673.

(*e*) *Lanham v. Pirie*, 2 Jur. N. S. 1201; *Heath v. Lewis*, 2 W. R. 488.

(*f*) *Re Alcan*, 1 De G. J. & S. 398.

(*g*) *Lester v. Bond*, 1 Dr. & Sm. 392.

(*h*) *Ex parte Bernard*, 6 Ir. Ch. Rep. 133.

(*i*) *Jones v. Geddes*, 9 Jur. 1002.

(*k*) *Re Bonelli's Electric Telegraph Company, Cook's Claim*, L. R. 18 Eq. 655; see however *Re Maugham*, 22 W. R. 748.

(*l*) *Steele v. Plomer*, 2 Ph. 782, n.; 1 Mac. & G. 83.

(*m*) *Biddulph v. Lord Camoys*, 7 Beav. 580.

(*n*) *Anderson v. Stather*, 10 Jur. 383.

(*o*) 11 Beav. 153.

(*p*) *Anon.*, 18 L. J. Ch. 229.

(*q*) *Blenkinsop v. Blenkinsop*, 2 Ph. 1.

(*r*) *Preston v. Dickenson*, 9 Jur. 919.

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[RULE IV.]
—

One order may
be made for
various matters
relating to ser-
vice abroad.

Affidavits, how
intituled.

Service, how
made on foreign
corporation.

importance have been settled since the passing of the Acts. In *Preston v. Lamont*, the statement of defence set forth that the action was commenced by writ in the form Appendix A., Part 1, Form 2, and served on the defendant at Glasgow, that the action was for breach of contracts made at Glasgow, that no breach had occurred within the jurisdiction, and none of the circumstances mentioned in O. XI., r. 1 (which see) existed, that the defendant was a Scottish subject born in Scotland, had been before the writ and ever since domiciled in Scotland and not elsewhere, and entitled to all the immunities and privileges secured to Scottish subjects of the Queen; that this Court had no jurisdiction over the subject-matter of the action, but several Courts in Scotland had, and could do complete justice. Held that the statement of defence was wholly bad, being a plea not to the jurisdiction but to the propriety of the service of the writ, that the question whether the action was within O. XI., r. 1, or not, was one for the Judge in Chambers, subject to appeal, and should not be raised on a statement of defence (a).

This case was decided before the publication of O. XI., r. 1a, published in the Rules of the Supreme Court, June, 1876 (which see, with reference to the facts of the case), though it does not affect the case as an authority.

Where an injunction is to be sought in an action on a writ to be served abroad, one order may be made giving leave to issue the writ, and upon the writ being issued that an injunction should issue, and that interrogatories may be served, and where this is asked, that the plaintiffs may be at liberty to serve the defendants out of the jurisdiction, such service to be subject to the usual directions as to time and otherwise. Affidavits are to be intituled in the name of the cause as it is to be, and in the matter of the Judicature Acts, on which it seems perjury might be assigned (b). So in *In the goods of Chamberlayne* (c), motion was made for leave to effect service of a writ on a Mrs. Brown residing at Lucerne, who had entered a caveat. Double leave seemed necessary, first for issue of a writ to be served out of the jurisdiction, and next under O. XI., r. 2 (which see) for service of the same writ. The President of the Division observed that separate applications could hardly have been intended, but as the rules seemed to require double leave he would hear the application for leave in both matters together; and subject to the production of an affidavit that Mrs. Brown was a British subject, whether she was married, or not, an order was made for service of the writ at Lucerne, a fortnight being allowed for appearance. But in *Meek v. Michaelsen* (d), on an *ex parte* application before Hall, V.-C., for leave to issue out of a district registry a writ of summons for service abroad, and to serve the writ or notice of it in Havannah, he said he thought that the Registrar could certainly not issue the writ without leave, but that after leave had been given for issue of the writ, he thought the Registrar could give leave for the service of the writ or notice of it abroad, but as leave was asked for both, he gave leave for both. There is nothing in the Judicature Acts to prevent the issue of a writ here on a foreign corporation resident abroad; but process can only be effected on them if at all by service of notice of the writ, not by service of the writ itself (e), see O. XI., r. 1; but a Colonial Government is not a corporation, and is not liable to service (f). Leave being sought to issue

(a) *Preston v. Lamont*, 1 Ex. D. 361; 45 L. J. Ex. D. 797; 35 L. T. N. S. 341; 24 W. R. 928.

(b) *Per Hall, V.-C., Young v. Brassey*, 1 Ch. D. 277; 45 L. J. Ch. D. 142; 24 W. R. 110.

(c) 20 S. J. 373.

(d) W. N. 1876, 111; 20 S. J. 391.

(e) *Westman v. Aktiebolaget Ekmans Mekaniska Snickarefabrik*, 1 Ex. D. 237; 45 L. J. 327; 24 W. R. 405.

(f) *Sloman v. Governor and Government of New Zealand*, 1 C. P. D. 563; 46 L. J. C. P. D. 185; 35 L. T. N. S. 454; 25 W. R. 86.

a writ against the Sultan, and serve a copy on the Turkish Ambassador, was refused as contrary to the comity of nations (*a*). A collision having taken place on the high seas out of the jurisdiction, between a British and a foreign ship registered in the name of the directors of a foreign company, the owners of the British ship applied for a writ of which notice should be given out of the jurisdiction in an action of damages in personam. Held that the Court had no jurisdiction to grant leave in such a case (*b*).

As to the whole matter of this rule, see *post*, O. XI., r. 1.

A Master cannot, nor can a District Registrar, give leave for service of writ or notice out of jurisdiction, O. LIV., r. 2a; otherwise r. 19 of June, 1876.

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[RULE IV.]

5. A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in Form No. 2 in Part I. of Appendix (A) hereto, with such variations as circumstances may require. Such notice shall be in Form No. 3 in the same part, with such variations as circumstances may require.

[RULE V.]

Forms for writ and notice for service out of jurisdiction.

It will be seen by referring that these forms are amended by the Rules of the Supreme Court, June, 1876.

6. With respect to actions upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act, 18 & 19 Vict. c. 67, shall continue to be used.

[RULE VI.]

As to bills of exchange, 18 & 19 Vict. c. 67, continued.

It was held that where procedure had been commenced under the Bill of Exchange Act, the practice under that Act must be strictly followed, and plaintiff could not sign judgment in default of appearance without filing an affidavit of personal service. He could not for this purpose have recourse to O. IX., r. 6 (which see), nor could he obtain an order for substituted service under O. IX., r. 2 (*c*). But an application to set aside a writ under the Bills of Exchange Act, issued out of a district registry, being referred to the Court, the writ was by them held good (*d*); and where an action had been brought in the Sheffield registry to which the defendant had appeared both in Sheffield and London, and had obtained leave to defend on paying £40 into Court, which he paid in, not in Sheffield but in London, judgment being signed and execution issued for non-compliance with the condition on defendant's application, it was held that by appearing in Sheffield he had waived his right to object to the action being brought there, and he was therefore only allowed to

(*a*) *Stewart v. Bank of England*, W. N. 1876, 263.

(*b*) *Re Smith*, 1 P. D. 300; 45 L. J. P. D. A. 92; 35 L. T. N. S. 380; 24 W. R. 903.

(*c*) *Pollock v. Campbell*, 1 Ex. D. 50; 45 L. J. Ex. D. 199; 34 L. T. N. S. 360; 24 W. R. 320; *Anon.*, W. N. 1875, 248; 20 S. J. 130, 141.

(*d*) *Oger v. Bradnum*, 1 C. P. D. 334; 45 L. J. C. P. D. 273; 34 L. T. N. S. 578; 24 W. R. 404.

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[RULE VI.]
—

defend on further conditions (a). Leave to defend having been obtained in a case under the Bills of Exchange Act, the cause thenceforward proceeds in the usual way (b).

It is supposed by some that though in ordinary cases of signing judgment in default of appearance, it is not necessary to leave with the officer a copy of the writ of summons issued on commencing the action, production only of the original or of a copy of it being accepted, yet in cases under the Bill of Exchange Act a strict compliance with the provisions of the Act ought to be carefully observed (c). Judgment under this Act being signed before the time limited for appearance in an order giving leave for substituted service, was set aside, and leave given to defend as if time were still current (d); see *post*, O. IX., r. 2.

The following is the portion of the Act mentioned in this rule :—

18 & 19 VICT. CAP. 67.

An Act to facilitate the Remedies on Bills of Exchange and Promissory Notes by the Prevention of frivolous or fictitious Defences to Actions thereon.
[23d July, 1855.]

WHEREAS *bonâ fide* holders of dishonoured bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills and notes : Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows :

From Oct. 24, 1855, all actions upon bills of exchange, &c., may be by writ of summons as form in Schedule A.

Plaintiff, on filing affidavit of personal service, may at once sign final judgment as form in Schedule B.

I. From and after the twenty-fourth day of October, one thousand eight hundred and fifty-five, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable may be by writ of summons in the special form contained in Schedule A. to this Act annexed, and indorsed as therein mentioned ; and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the Court, or an order for leave to proceed, as provided by the Common Law Procedure Act, 1852, and a copy of the writ of summons and the indorsements thereon, in case the defendant shall not have obtained leave to appear and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in Schedule B. to this Act annexed (on which judgment no proceeding in error shall lie) for any sum not exceeding the sum indorsed on the writ, together with interest, at the rate specified (if any), to the date of the judgment, and a sum for costs to be fixed by the masters of the Superior Courts or any three of them, subject to the approval of the Judges thereof or any eight of them (of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may upon such judgment issue execution forthwith.

Defendant showing a defence upon the merits to have leave to appear.

II. A Judge of any of the said Courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ,

(a) *Ibbotson v. Whitworth*, W. N. 1876, 10 ; 20 S. J. 217.

(b) *Norris v. Beazley*, 2 C. P. D. 80 ; 46 L. J. C. P. D. 169, 515 ; 35 L. T. N. S. 846 ; 25 W. R. 320.

(c) 20 S. J. 468 ; see O. XIII., r. 3.

(d) *Johnson v. Moffat*, W. N. 1875, 248 ; 20 S. J. 139.

and to defend the action, on the defendant paying into Court the sum indorsed on the writ, or upon affidavits satisfactory to the Judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the Judge may seem fit.

III. After judgment, the Court or a Judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear to be reasonable to the Court or Judge so to do, and on such terms as to the Court or Judge may seem just.

IV. In any proceedings under this Act it shall be competent to the Court or a Judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the Court, and further to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof.

V. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Act for the recovery of the amount of such bill or note.

VI. The holder of any bill of exchange or promissory note may, if he think fit, issue one writ of summons, according to this Act, against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall be in like manner, so far as may be, as if separate writs of summons had been issued.

VII. The provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said Acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this Act.

VIII. The provisions of this Act shall apply, as near as may be, to the Court of Common Pleas at Lancaster and the Court of Pleas at Durham, and the Judges of such Courts, being Judges of one of the Superior Courts of Common Law at Westminster, shall have power to frame all rules and process necessary thereto.

IX. It shall be lawful for Her Majesty from time to time, by an Order in Council, to direct that all or any part of the provisions of this Act shall apply to all or any Court or Courts of Record in England and Wales, and within one month after such order shall have been made and published in the *London Gazette* such provisions shall extend and apply in manner directed by such order, and any such order may be, in like manner, from time to time altered and annulled; and in and by any such order Her Majesty may direct by whom any powers or duties incident to the provisions applied under this Act shall and may be exercised with respect to matters in such Court or Courts, and may make any orders or regulations which may be deemed requisite for carrying into operation in such Court or Courts the provisions so applied.

X. Nothing in this Act shall extend to Ireland or Scotland.

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[RULE VI.]

Bills of Exchange Act.

Judge may, under special circumstances, set aside judgment.

Judge may order bill to be deposited with officer of court in certain cases.

Remedy for the recovery of expenses of noting non-acceptance of dishonoured bill.

Holder of bill of exchange may issue one summons against all or any of the parties to the bill.

Common Law Procedure Acts and Rules incorporated with this Act.

Act to apply to Courts of Common Pleas, Lancaster and Durham.

Her Majesty may direct Act to apply to Courts of Record in England and Wales.

Extent of Act.

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COURT.

Ord. 2.

[RULE VI.]

*Bills of Ex-
change Act.*

XI. In citing this Act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Summary Procedure on Bills of Exchange Act, 1855."

SCHEDULES REFERRED TO IN THE FOREGOING ACT.

A.

VICTORIA, by the Grace of God, &c.

To *C.D.*, of _____, in the county of _____. We warn you, That unless within twelve days after the service of this writ on you, inclusive of the day of such service, you obtain leave from one of the Judges of the Courts at Westminster to appear, and do within that time appear in our Court of _____ in an action at the suit of *A.B.*, the said *A.B.* may proceed to judgment and execution.

Witness, &c.

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be served within six calendar months from the date hereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ before Service thereof (a).

This writ was issued by *E.F.*, of _____, attorney for the plaintiff. Or, this writ was issued in person by *A.B.*, who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence].

Indorsement.

The plaintiff claims [_____ pounds principal and interest], or _____ pounds balance of principal and interest due to him as the payee [or indorsee] of a bill of exchange or promissory note, of which the following is a copy:—

[Here copy bill of exchange or promissory note, and all indorsements upon it.]

And if the amount thereof be paid to the plaintiff or his attorney within _____ days from the service hereof, further proceedings will be stayed.

NOTICE.

Take notice, that if the defendant do not obtain leave from one of the Judges of the Courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do within such time cause an appearance to be entered for him in the Court out of which this writ issues, the plaintiff will be at liberty at any time after the expiration of such twelve days to sign final judgment for any sum not exceeding the sum above claimed, and the sum of _____ pounds for costs, and issue execution for the same.

Leave to appear may be obtained on an application at the Judges' Chambers, Serjeants' Inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

Indorsement to be made on the Writ after Service thereof.

This writ was served by *X.Y.* on *L.M.* (the defendant the defendants), on Monday the _____ day of _____ 18 ____.

By *X.Y.*

(a) See further Reg. Gen. Nov. 26th, 1855, and Reg. Gen. H. T. 1858.

B.

In the Queen's Bench.

On the day of in the year of our Lord
 18 [*day of signing judgment*].

ENGLAND (to wit). *A.B.* in his own person [*or by*
 his attorney] sued out a writ against *C.D.*, indorsed as follows :—

[*Here copy indorsement of plaintiff's claim.*]

and the said *C.D.* has not appeared :

Therefore it is considered that the said *A.B.* recover against the said
C.D. pounds, together with pounds for
 costs of suit.

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[RULE VI.]

*Bills of Ex-
change Act.*

REGULA GENERALIS, MICHAELMAS TERM, 1855.

*Indorsements on writs under the Summary Procedure on Bills of Exchange
 Act, 1855.*

MONDAY, NOVEMBER 26TH, 1855.

The indorsements on writs under this Act may be in the following
 form :—

This writ was issued by *E.F.*, of &c., attorney for the plaintiff, or by
A.B., who resides at [*mention the city, town, or parish, and also the name
 of the hamlet, street, and number of the house of the plaintiff's residence*].

The plaintiff claims £ , principal and interest [*or*
 pounds, balance of principal and interest], due to him as the
 payee [*or indorsee*] of a bill of exchange [*or promissory note*], of which
 the following is a copy :—

[*Here copy bill of exchange or promissory note, and all indorsements
 upon it.*]

And also shillings for noting [*if noting has been paid*],
 and £ for costs. And if the amount thereof be paid to the
 plaintiff or his attorney within four days from the service hereof, further
 proceedings will be stayed.

NOTICE.

Take notice, that if the defendant do not obtain leave from one of the
 Judges of the Courts within twelve days after having been served with this
 writ, inclusive of the day of such service, to appear thereto, and do not
 within such time cause an appearance to be entered for him in the Court
 out of which this writ issues, the plaintiff will be at liberty, at any time
 after the expiration of such twelve days, to sign final judgment for any
 sum not exceeding the sum above claimed, and the sum of £
 for costs, and issue execution for the same.

Leave to appear may be obtained on an application at the Judges'
 Chambers, Serjeants' Inn, London, supported by affidavit, showing that
 there is a defence to the action on the merits, or that it is reasonable that
 the defendant should be allowed to appear in the action.

Indorsement to be made on the Writ after Service thereof.

This writ was served by *X.Y.* on *L.M.* [*the defendant*] on Monday, the
 day of 186 , by *X.Y.*

By the Judges.

N.B.—No other claim than a claim on a Bill of Exchange or Promissory
 Note is to be included in writs issued under the Summary Procedure on
 Bills of Exchange Act, 1855.

RULES OF
COURT.

REGULA GENERALIS, HILARY TERM, 1858.

As to Claims on Bills of Exchange, &c.

Ord. 2.

[RULE VI.]
—

Whereas by the rule of Michaelmas Term, 1855, with respect to indorsements on writs issued under the Bills of Exchange Act, 1855, it was, amongst other things, ordered, "that no other claim than a claim on a bill of exchange or promissory note should be included in writs under the Summary Procedure on Bills of Exchange Act, 1855:"

And whereas it is expedient that the said rule should be explained and amended: It is hereby ordered, that where a defendant obtains leave to appear according to the said Act, and enters appearance to any such writ according to the said rule of Michaelmas Term, 1855, the plaintiff may include in his declaration together with a count on a bill of exchange or promissory note (as the case may be), a count upon the consideration, if any, between the plaintiff and defendant for the bill of exchange or promissory note, and deliver a particular of demand accordingly.

(Signed)

By the Judges.

Read in Court, January 30th, 1858.

[RULE VII.]

Forms for writ
in Admiralty.

7. The writ of summons in every Admiralty action in rem shall be in *Form No. 4 of Part. I. of Appendix (A)* hereto with such variations as circumstances may require.

This rule has been altered by the substitution of Form A in the Appendix to the Rules of Dec., 1875, in lieu of the Form mentioned in this rule (see Rules of the Supreme Court, Dec., 1875), next following:—

[RULE VIIA.]

7A. Form A in the Appendix to these Rules shall be substituted for the form referred to in Order II., Rule 7, of "The Rules of the Supreme Court."

[RULE VIII.]

Date and test
of writs.

8. Every writ of summons and also every other writ shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England.

Ord. 3.

ORDER III.

INDORSEMENTS OF CLAIM.

[RULE I.]

Writ to be
indorsed before
issued.

1. The indorsement of claim shall be made on every writ of summons before it is issued.

See O. II., r. 1; see further, *post*, rr. 7 and 8.

[RULE II.]

Precise ground
of complaint or

2. In the indorsement required by Order II., Rule 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the

plaintiff considers himself entitled. The plaintiff may by leave of the Court or Judge amend such indorsement so as to extend it to any other cause of action or any additional remedy or relief.

RULES OF
COURT.

Ord. 3.

[RULE II.]

precise remedy
not required.
Amendment
allowed.

Under the latter clause of this rule a plaintiff who had only asked for administration was, on an *ex parte* application by motion, allowed to amend his indorsement by asking for a receiver and an injunction (a). This power is amplified now by O. XXVII., r. 11, Rules of the Supreme Court, Feb., 1876, which enacts that the Court, or a judge, may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner, and on such terms, as may seem just.

In certain cases it seems a practice has sprung up for which the rules have made no provision, of asking for particulars of demand. See *post*, notes on r. 7.

Thus in one case on an application for particulars before statement of claim delivered, though a statement of claim was not waived, and though it was in fact prepared containing full particulars of demand, yet the Master ordered particulars to be delivered, and his order was affirmed by the Judge (b). See *post*, p. 272, O. XXI., r. 1. In the case of *Matthias v. Matthias* (c), leave having been given by the Court to amend the writ, the Clerk of Records and Writs had been applied to for the purpose of making the amendment upon production of counsel's brief with the order indorsed thereon, and initialed by the Registrar, but he refused to amend until the order had been drawn up. The Master of the Rolls, however, directed that the writ be amended upon production of the brief in the case indorsed by counsel, and marked by the Registrar with his initials.

3. The indorsement of claim may be to the effect of such of the Forms in Part II. of Appendix (A) hereto as shall be applicable to the case, or if none be found applicable then such other similarly concise form as the nature of the case may require.

[RULE III.]

Forms of in-
dorsement of
claim.

In the case of *Cooper v. Blisset* (d), though the writ did not show, nor did the indorsement express, that the plaintiff, a creditor claiming administration, was suing on behalf of himself and other creditors, Vice-Chancellor Hall yet made an order for administration comprising an inquiry as to debts generally, observing that that inquiry was sufficient indication that the suit was on behalf of all creditors. This case, however, the Master of the Rolls refused to follow in *Worraker v. Pryor* (e), and required an amendment in the indorsement stating that the plaintiff was suing on behalf of himself and all other creditors. Nevertheless Vice-Chancellor Hall, in a subsequent case, followed his former decision (f), but Malins, V.-C., on the other hand, has followed *Worraker v. Pryor* in

(a) *Colebourne v. Colebourne*, 1 Ch. D. 690 ; 45 L. J. Ch. D. 749 ; 24 W. R. 235.

(b) *Barker v. Wood*, W. N. 1876, 56 ; 20 S. J. 282.

(c) W. N. 1876, 214.

(d) 1 Ch. D. 691 ; 24 W. R. 235.

(e) 2 Ch. D. 109 ; 45 L. J. Ch. D. 273 ; 24 W. R. 269.

(f) *Pryer v. Wiseman*, 20 S. J. 292.

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[RULE III.]

Adcock v. Peters (a), dissenting expressly from *Cooper v. Blisset*, as did Bacon, V.-C., also in *Fryer v. Royle* (b).

There is thus a difference of opinion among the Judges, which can only be settled by a decision of the Court of Appeal. We may say, however, that we consider the Master of the Rolls and Malins, V.-C., to have the best arguments on their side.

[RULE IV.]

Indorsement to
show capacity
of parties.

4. If the plaintiff sues or the defendant or any of the defendants is sued in a representative capacity, the indorsement shall show, in manner appearing by the statement in Appendix (A) hereto, Part II., sec. VIII., or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

[RULE V.]

Character in
which plaintiff
claims in
Probate.

5. In Probate actions the indorsement shall show whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir-at-law, devisee, or in any and what other character.

[RULE VI.]

Special indorse-
ment of par-
ticulars of
demand where
liquidated.

6. In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set off.

Difference from
15 & 16 Vict.
c. 76, s. 25.

This rule is in words a repetition of s. 25 of the Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76), with the single exceptions herein stated that the section commences: In all cases where the defendant resides within the jurisdiction of the Court, and the claim is for debt, &c., and it thus proceeds exactly as the rule, save that at the end of the rule there are introduced after the words "or note," the words "or on a trust," which are not in the section, and the rule proceeds, "the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered after giving credit for any payment or set-off;" while the section proceeds, "the plaintiff shall be at liberty to make upon the writ of summons and

(a) W. N. 1876, 139; 20 S. J. 451.

(b) 5 Ch. D. 540; 36 L. T. N. S. 441; 25 W. R. 528.

copy thereof a special indorsement of the particulars of his claim in the form contained in the Sched. A to this Act annexed, marked No. 4, or to the like effect; and when a writ of summons has been indorsed in the special form hereinbefore mentioned, the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered unless ordered by the Court or a Judge. In all the cases in this schedule in which rules already in existence either in Chancery or in the Common Law Courts are reiterated either entirely or nearly *ipsissimis verbis*, it is because what was formerly the practice of one branch of the judicial administration is now made general for all the Courts having to do with the matter, as nearly all have to do with it.

An indorsement, "The plaintiff's claim is £36 5s. for balance of account for goods sold," was held a good special indorsement under this rule (a). See **O. XIV., r. 1**, and Appendix A., Part II., sec. VII. To an action against husband and wife to recover principal and interest due to the indorsee on a joint and several promissory note, neither defendant appeared, and the plaintiff applied to sign final judgment under **O. XIII., r. 3** (which see), against husband only. The registrar refused to allow him. The Master of the Rolls said this rule, **O. III., r. 6**, did not require special particulars to be indorsed if sufficiently specific to inform the defendant of the claim against him as required by the next rule, and neither party having appeared, the plaintiff was entitled to sign judgment in any case against any one or more defendants, whether the others had appeared or not (b). Nearly all the cases worthy of note under this rule will come under consideration under **O. XIV., r. 1** (which see).

RULES OF COURT.

Ord. 3.

[RULE VI.]

Reason for reiterating former enactments.

Special indorsements.

7. Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, beside stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state, that upon payment thereof within four days after service, or in case of a writ not for service within the jurisdiction within the time allowed for appearance, further proceedings will be stayed. Such statement may be in the form in Appendix (A) hereto, Part II., sec. III. The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation.

[RULE VII.]

Shall state amount claimed for debt and costs, and stay of proceedings on payment in due time as well as nature of claim.

Form of statement.

As to costs nevertheless.

By the R. G. H. T., 1853, certain amounts were made indorsable for costs on writs, under s. 27 of the Common Law Procedure Act, 1852, the form given under s. 25 mentioned above, unless the plaintiff's attorney claimed more, in which case costs were claimed on the writ in this form: "Such sum as shall be allowed on taxation for costs," and in case the plaintiff was found not entitled to more costs than the fixed sums given, or if more than one-sixth were disallowed of his claim, the plaintiff's attorney paid the costs of taxation. By R. G. E. T., 1857, it was ordered that plaintiffs suing in contract for £20 or less, might, if they should claim costs, indorse on the writ of summons the following notice: "Take notice

Practice under Common Law Procedure Act, 1852.

(a) *Anon.*, W. N. 1875, 220; 20 S. J. 81; apparently confirmed 20 S. J. 94.
 (b) *Delasaux v. Barling*, 20 S. J. 299.

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[RULE VII.]

Difference of
new rule.Particulars of
demand.

[RULE VIII.]

In cases of
account, claim
for account to
be indorsed.Semble ad-
ministration by
summons, &c.,
still retained.

that if judgment be signed for default of appearance, the plaintiff will, without summons, apply to a Judge for his costs of suit, unless before judgment you shall give notice to him or his attorney that you intend to oppose such application." If the defendant gave such notice in writing (a), the plaintiff had to proceed by summons or order; but if no such notice was given, the plaintiff might produce the indorsement to a Judge at Chambers, for an order for costs *ex parte*, and if the Judge should sign his name to the indorsement, such signature acted as an order for costs, and the master might tax them thereon accordingly. In case of any application for costs without such indorsement, the plaintiff was not entitled to more costs than if he had made such indorsement, unless a Judge should otherwise order.

This rule requires the plaintiff's solicitor to name the costs he claims, but does not preclude the defendant from taxing them, but it names no specific sum, leaving the plaintiff always to name the sum he claims.

In many cases particulars of demand will not be ordered or allowed as a matter of course. When they can be indorsed or stated in the claim they ought to be so, and the expense of a second document saved (b). So Quain, J., also expressed himself: "It was presumed under these Acts particulars of demand would be unnecessary; the statement of claim or indorsement should give full particulars" (c). Where particulars of damages claimed in counterclaim were not in all parts sufficiently stated in the pleadings the parts not sufficiently specific were nevertheless ordered on summons to be explained (d).

8. In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken.

It is submitted that this rule does not defeat or abolish the process of administration by summons, motion, or petition, under 13 & 14 Vict. c. 35, as altered by 23 & 24 Vict. c. 38, s. 14, and the proceeding, under 15 & 16 Vict. c. 86, s. 45, and s. 47, by summons, as by s. 73 of the principal Act all practice not inconsistent with that laid down by this Act and the rules under it, is retained, and by these rules the writ of summons is only provided for the commencement of suits in Chancery beginning now by bill or information, and it is presumed all the other rules relating to actions refer to practice on writ of summons.

With reference to this rule, see O. XV., *post*, p. 222.

Ord. 4.

ORDER IV.

INDORSEMENT OF ADDRESS.

[RULE I.]

Address of
plaintiff and
name or firm

1. The solicitor of a plaintiff suing by a solicitor shall indorse upon every writ of summons and notice in lieu of service of a writ of summons the address of the plaintiff, and

(a) *Woodward v. North*, 5 H. & N. 790.

(b) *Per Lush, J., Anon.*, W. N. 1875, 202; 20 S. J. 57; but see *Barker v. Wood*, *ante*, note to r. 2.

(c) *Anon.*, 20 S. J. 102; *Ross v. Gibbs*, W. N. 1875, 238; 20 S. J. 120.

(d) *Anon.*, W. N. 1875, 220; 20 S. J. 81.

also his own name or firm and place of business, and also, if his place of business shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

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[RULE I.]

and place of
business or
address for
service of
solicitor to be
indorsed on
writ of sum-
mons or notice
in lieu thereof.

Where agent
also name or
firm and place
of business of
principal
solicitor.

Amended,
r. 2a.

By reference to **O. XVI., r. 10**, it will be seen that application may be made to Judge in certain cases where it is not made sufficiently plain who are the persons actually suing, but no rule seems to justify any application for the names of parties interested in the suit where it is brought by a plaintiff on behalf of himself, and all others in the like position, with regard to the defendant, the plaintiff himself being, as in this rule, properly named and described in the indorsement (a).

2. A plaintiff suing in person shall indorse upon every writ of summons and notice in lieu of service of a writ of summons his place of residence and occupation, and also, if his place of residence shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him.

[RULE II.]

Plaintiff in
person to
indorse place
of residence
and occupation
and if needful
address for
service.

[The above two Rules are to apply to all cases in which the writ of summons is issued out of the London office, or out of a district registry where the defendant has the option of entering an appearance either in the district registry or the London office.]

This rule and **r. 1** are amended by **r. 2a** which follows, being promulgated in rules of the Supreme Court, Feb., 1876.

2A. Notwithstanding anything to the contrary contained in Order IV. of "The Rules of the Supreme Court," Rules 1 and 2 of such Order shall only apply where the writ of summons is issued out of the London office.

[RULE IIA.]

RR. 2 and **3** receive interpretation from the following Order, **r. 2**, which explains when a defendant may enter an appearance either in the district registry or the London office.

(a) *Charles Leathley, on behalf of himself and all others, Underwriters of the Steamship Cid at the time of its loss, &c., v. Robert MacAndrew & Co., W. N. 1875, 259; 20 S. J. 160.*

RULES OF
COURT.

Ord. 4.

[RULE IIIA.]

Where writ is
from district
registry, how
indorsed in
other cases.

3. *Annulled, February, 1876 ; following rule substituted:*

3A. Order IV., Rule 3, is hereby annulled, and the following shall stand in lieu thereof:

In all cases where a writ of summons is issued out of a district registry the solicitor shall give on the writ the address of the plaintiff, and his own name or firm and his place of business, which shall, if his place of business be within the district of the registry, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar; and where the solicitor issuing the writ is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. Where the plaintiff sues in person, he shall give on the writ his place of residence and occupation, which shall, if his place of residence be within the district, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar.

Ord. 5.

ORDER V.

ISSUE OF WRITS OF SUMMONS.

1. *Place of issue.*

[RULE I.]

Except in Pro-
bate plaintiff
may issue writ
out of any
district.

1. In any action other than a Probate action, the plaintiff wherever resident may issue a writ of summons out of the registry of any district.

But where defendant is served with a writ issued out of a district registry within the jurisdiction whereof he neither resides nor carries on business, he might, under O. XXXV., r. 1, by application to Court or Judge, obtain an order to have the subsequent proceedings taken in London (a).

But now O. XXXV., r. 1a is substituted for O. XXXV., r. 1; this however does not alter, as it would seem, the effect of the decision.

(a) *Oger v. Bradnum*, 1 C. P. D. 334; 45 L. J. C. P. D. 273; 34 L. T. N. S. 578; 24 W. R. 404.

RULES OF COURT.

Ord. 5.

[RULE II.]

2. In all cases where a defendant neither resides nor carries on business within the district out of the registry whereof a writ of summons is issued, there shall be a statement on the face of the writ of summons that such defendant may cause an appearance to be entered at his option either at the district registry or the London office, or a statement to the like effect.

Where defendant not within district, statement on writ of his option to appear in London or district.

[RULE III.]

3. In all cases where a defendant resides or carries on business within the district, and a writ of summons is issued out of the district registry, there shall be a statement on the face of the writ of summons that the defendant do cause an appearance to be entered at the district registry, or to the like effect.

Where defendant within district, statement on writ that he appear in district.

2. *Option to choose division in certain cases.*

[RULE IV.]

4. Subject to the power of transfer, every person by whom any cause or matter may be commenced in the High Court of Justice which would have been within the non-exclusive cognizance of the High Court of Admiralty if the said Act had not passed shall assign such cause or matter to any one of the divisions of the said High Court, including the Probate, Divorce, and Admiralty Division, as he may think fit, by marking the document by which the same is commenced with the name of the division, and giving notice thereof to the proper officer of the Court. If so marked for the Chancery Division the same shall be assigned to one of the Judges of such division by marking the same with the name of such of the said Judges as the plaintiff or petitioner (subject to such power of transfer) may think fit.

Person commencing cause within concurrent jurisdiction of Admiralty may assign to any division. How assigned. If assigned to Chancery division to be assigned to one Judge in like manner.

This rule would have got rid of what would seem to have been an oversight in s. 35 of the principal Act, if that section had not been repealed and replaced by s. 11 of the Act of 1875; the effect of that section would have been to abolish altogether the jurisdiction of the Admiralty Division in every case in which the Court of Admiralty, before the passing of this Act, would have had concurrent jurisdiction with any other Court; the section, however, was limited and made subject to any rules of Court, so the jurisdiction was by this rule retained to the Admiralty Division as well as other Divisions of the Court, even before the passing of the above-mentioned section, which now retains it without the assistance of the rule. The rule is in terms confined to actions in which the Court of Admiralty had jurisdiction, though not exclusive jurisdiction, but it seems to have been intended to apply to all cases. The notice here mentioned to the officer of the Court is given, see *post*, r. 9, by leaving with him a copy of the writ marked as in this rule is ordered.

Rule remedied mistake in sect. 35 of Act of 1873 before the amendment by sect. 11 of Act of 1875.

**RULES OF
COURT.**

Ord. 5.

[RULE IVA.]

Causes or matters assigned to Chancery Division to be marked with name of one of the Judges thereof.

Appears to repeal or amend.

The following rule has been added by the Rules of June, 1877 :—

4A. Subject to the power of transfer, and subject also to the power of the Lord Chancellor by order from time to time otherwise to direct, every cause or matter which shall be commenced in the Chancery Division of the High Court, shall be assigned to one of the Judges thereof by marking the same with the name of such of the same Judges as the plaintiff or petitioner may in his option think fit.

It is to be remarked that this rule appears to repeal or amend last clause of the old rule immediately preceding it, though this is not formally expressed.

3. Generally.

[RULE V.]

Preparation and shape of writs of summons.

5. Writs of summons shall be prepared by the plaintiff or his solicitor, and shall be written or printed, or partly written and partly printed, on paper of the same description as hereby directed in the case of proceedings directed to be printed.

See further as to printing **O. LVI.**, r. 2, and as to costs thereof, see Rules of Supreme Court (Costs), **O. V.** r. 1.

[RULE VI.]

Writ of summons to be sealed.

6. Every writ of summons shall be sealed by the proper officer, and shall thereupon be deemed to be issued.

[RULE VII.]

Writ to be presented for sealing properly prepared.

7. The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy, written or printed, or partly written and partly printed, on paper of the description aforesaid, of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person.

Upon indictment for perjury, as having been committed on trial of an action in High Court of Justice, the existence of the action is sufficiently proved by the production, by the officer of the Court, of copy writ filed under this rule, and copy pleadings filed under **O. XLI.**, r. 1 (a).

[RULE VIII.]

On receipt to be filed and filing entered.

8. The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book to be called the Cause Book, which is to be kept in the manner

(a) *The Queen v. Scott*, 2 Q. B. D. 415 ; 46 L. J. M. C. 259 ; 36 L. T. N. S. 476 ; 25 W. R. 697.

in which Cause Books have heretofore been kept by the Clerks of Records and Writs in the Court of Chancery, and the action shall be distinguished by the date of the year, a letter, and a number, in the manner in which causes are now distinguished in such last-mentioned Cause Books.

RULES OF
COURT.

Ord. 5.

[RULE VIII.]

Action distin-
guished how?

A supplementary Rule was issued in June, 1876, as follows:

The following words are hereby added to the end of Order V., Rule 8, of "The Rules of the Supreme Court":—

"And when such action shall be commenced in a district registry, it shall be further distinguished by the name of such registry."

9. Notice to the proper officer of the assignment of an action to any division of the Court under section 11 of the Supreme Court of Judicature Act, 1875, or under Rule 4 of this Order, shall be sufficiently given by leaving with him the copy of the writ of summons.

[RULE IX.]

Leaving writ
to be notice of
assignment to
division of
Court.

4. *In particular Actions.*

10. The issue of a writ of summons in Probate actions shall be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs in verification of the indorsement on the writ.

[RULE X.]

Affidavit veri-
fying indorse-
ment in Pro-
bate action.

The forms of indorsements mentioned in this rule are given in Appendix A., Part II., sec. V.

11. *This Rule was annulled by Rules of the Supreme Court, December, 1875, which was afterwards annulled by Rules of the Supreme Court, February, 1876, as follows:*

[RULE XI.]

"Rule 3 of the Rules of the Supreme Court, December, 1875, is hereby annulled, and the following Rule substituted:—The first paragraph of Rule 11 of Order V. of 'The Rules of the Supreme Court' is hereby annulled, and the following shall stand in lieu thereof: In Admiralty actions *in rem* a warrant for the arrest of property according to the Form A in the Appendix to these Rules may be issued at the instance either of the plaintiff or of the defendant at any time after the writ of summons has issued, but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed, and the following provisions complied with."

In Admiralty
actions *in rem*
warrant for
arrest of pro-
perty may be
issued at any
time after writ
of summons
has issued, but
not until affi-
davit filed.

RULES OF
COURT.

Ord. 5.

[RULE XI.]

Purport of
affidavit.In action of
wages.In action of
bottomry.In action for
distribution
of salvage.Discretion of
Court notwith-
standing
deficiency of
affidavit.

[RULE XII.]

(a.) The affidavit shall state the name and description of the party on whose behalf the action is instituted, the nature of the claim, the name and nature of the property to be arrested, and that the claim has not been satisfied.

(b.) In an action of wages the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the institution of the action has been given to the Consul of the State to which the vessel belongs, if there be one resident in London [*a copy of the notice shall be annexed to the affidavit*].

(c.) In an action of bottomry, the bottomry bond, and if in a foreign language also a notarial translation thereof, shall be produced for the inspection and perusal of the Registrar, and a copy of the bond, or of the translation thereof, certified to be correct, shall be annexed to the affidavit.

(d.) In an action of distribution of salvage the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name, address, and description of the party holding the same.

(e.) The Court or Judge may in any case, if he think fit, allow the writ of summons to issue although the affidavit may not contain all the required particulars. In a wages cause he may also waive the service of the notice, and in a cause of bottomry the production of the bond.

12. *This Rule was annulled by the Rules of the Supreme Court, December, 1875.*

ORDER VI.

CONCURRENT WRITS.

Ord. 6.

[RULE I.]

Concurrent
writs may be
issued within
twelve months
from issue of
original.

1. The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force.

Slight differ-
ence from
former practice.

This rule is a slight variation on s. 9 of the Common Law Procedure Act, 1852, the chief difference being that the writ now is to run for twelve months, and twelve months therefore is the time within which

concurrent writs may issue. Concurrent writs might issue into the same county, but each defendant was only liable for the cost of the one with which he was served (*a*).

No fresh *precipe* (now memorandum, see Appendix A., Part I., No. 5), it seems, was wanting, but a memorandum was indorsed by the master of the original *præcipe* (*b*). It was held that no concurrent writ could issue more than six months after the original writ, though the latter had been duly renewed (*c*); this would now be twelve months instead of six.

And since the passing of these Acts, it has been held that where the writ has been lost after renewal the Court has no power to allow a copy of the renewed writ to be sealed as an original in substitution for the lost writ, or to issue a concurrent writ, the time for doing so being past. The Court in such a case can give assistance neither under the Common Law Procedure Act, 1852, nor under these Acts (*d*).

For continuance and renewal of writs, see O. VIII., and note thereon.

RULES OF COURT.

Ord. 6.

[RULE I.]

No concurrent writ after six months formerly.

2. A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given, out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction.

[RULE II.]

Writ for service within jurisdiction may be issued concurrent with writ for service out of jurisdiction, or vice versa.

This rule corresponds to s. 22 of the Common Law Procedure Act, 1852.

Where one of the defendants in a probate action was a foreigner resident abroad, the Court ordered that he should receive notice in lieu of service of a writ marked as a concurrent writ under this rule (*e*).

ORDER VII.

Ord. 7.

DISCLOSURE BY SOLICITORS AND PLAINTIFFS.

1. Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a Judge.

[RULE I.]

Solicitor whose name indorsed to declare on demand whether writ issued by him, and if he deny writ all proceedings thereon stayed.

This rule is taken from the Common Law Procedure Act, 1852, s. 7.

(*a*) *Angus v. Coppard*, 3 M. & W. 57.

(*b*) *Crow v. Crow*, 1 D. & L. 709.

(*c*) *Cole v. Sherard*, 11 Ex. 482, and 25 L. J. Ex. 59.

(*d*) *Davis v. Garland*, 1 Q. B. D. 250; 45 L. J. Q. B. D. 137; 33 L. T. N. S. 727; 24 W. R. 252.

(*e*) *Beddington v. Beddington*, 1 P. D. 426; 45 L. J. P. D. A. 44; 34 L. T. N. S. 366; 24 W. R. 348.

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COURT.**Ord. 7.**

[RULE II.]

When writ by partners in name of firm, plaintiffs or solicitors to declare on demand names and addresses of members of firm. On failure action may be stayed.

When declared action to be as if they were named in writ.

See also Order XVI., Rule 10.

Courses optional.

Probably ex parte.

2. When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm. And if the plaintiffs or their solicitor shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a Judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm.

This rule seems to be in some respects ancillary to O. XVI., r. 10, and in some respects it will probably raise a difficulty, as it seems to give a different form of remedy from that given in O. XVI., r. 10, in nearly a similar case, and it will probably be doubtful which rule one ought to follow. It will probably be held that in such case a party may elect which remedy he will adopt. It does not seem to be laid down whether the application to the Court or a Judge to stay the action, on the default of the plaintiffs or their solicitor in furnishing their names and addresses, is to be made *ex parte* or on notice, but no mention being made of notice, it is submitted that the application may be *ex parte*, more especially as no injustice would be effected by such a course, the default being on the part of the plaintiffs.

Ord. 8.

ORDER VIII.

RENEWAL OF WRIT.

[RULE I.]

Writ may be renewed by leave, when.

How.

1. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to a Judge, or the District Registrar, for leave to renew the writ; and the Judge or Registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to

him by the plaintiff or his solicitor of a memorandum in Form No. 5 in Appendix (A), Part I.; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuing of the original writ of summons.

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COURT.

Ord. 8.

[RULE I.]

Form.

This rule is, almost verbatim, s. 11 of the Common Law Procedure Act, 1852, except that the currency of a writ is made twelve months instead of six, and words are introduced by which leave must now be obtained to renew the writ on the grounds mentioned, which hitherto was unnecessary. A memorandum in Form No. 5, in Appendix A, Part I., is substituted for the præcipe formerly required for an alias writ. Though the original writ of summons is only effective as compulsory process during its legal currency, it was held that the defendant might if he pleased accept service, and enter an appearance voluntarily, or give a cognovit after that period, and such appearance and cognovit were held good (a); and if the writ be served he should not treat it as a nullity, but apply to the Court to set the service aside (b).

Though writ effective only during currency, defendant might appear after at will, and if served should apply to set aside writ.

It would be irregular to renew a writ which had been duly served, but where it had been served on the wrong person it was well renewed afterwards, though a declaration had been filed theretofore (c).

Might be renewed if served on wrong person.

The time within which a renewed writ was reckoned, and it is presumed will still be reckoned, is, inclusive of the day of the previous renewal, so that a writ renewed on the 1st of January, must now be renewed on or before the 30th of December (d), and if the last day be a Sunday or holiday, it cannot be renewed the next day the office is open (e), nor had the Court jurisdiction to order it to be sealed, *nunc pro tunc*, unless the omission to seal it arose from the fault of its own officer (f).

Time within which renewed writ reckoned.

The case before mentioned of *Davis v. Garland* (g), is a case upon renewed writs as well as concurrent writs, and worthy of note here. In it the writ had been lost after renewal. The Court had no power to allow a copy of the renewed writ to be sealed as an original in substitution for the lost writ, or to issue a concurrent writ, the time for doing so being expired. In such a case the Court can give no assistance either under the Common Law Procedure Act, 1852, nor under these Acts. It seems that a writ, issued before the commencement of these Acts, does not require leave in order to renew it (h). Where the plaintiff had been unable to serve a writ issued Jan. 8th, 1876, and amended Feb. 15th, 1876, an application was made to the Master of the Rolls, on Feb. 12th, 1877, for renewal of the writ, reference being made to O. VIII., r. 1, and O. LVII., r. 6. The Master of the Rolls held that the twelve months must be reckoned from the date of the writ, and ordered that, notwithstanding the twelve

(a) *Coates v. Sandy*, 2 Man. & Gr. 313; *Richardson v. Daly*, 4 M. & W. 384.

(b) *Hemp v. Warren*, 2 Dowl. N. S. 758.

(c) *Clarke v. Johnson*, 3 D. & R. 254; 2 B. & C. 95.

(d) *Anon.*, 1 H. & C. 664; 32 L. J. Ex. 88.

(e) *Ibid.*, *Evans v. Jones*, 2 B. & S. 45; 31 L. J. Q. B. 5; *Anon.*, 31 L. J. Q. B. 61; see also *Campbell v. Smart*, 5 C. B. 196.

(f) *Nazer v. Wade*, 1 B. & S. 728; 31 L. J. Q. B. 5.

(g) 1 Q. B. D. 250; 46 L. J. Q. B. D. 137; 33 L. T. N. S. 727; 24 W. R. 252.

(h) 20 S. J. 32.

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COURT.

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[RULE II.]

Evidence of
renewal, &c.

months had elapsed, the plaintiff should be at liberty to renew the writ as against the defendant (*a*).

2. The production of a writ of summons purporting to be marked with the seal of the Court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes.

This rule is verbatim s. 13 of the Common Law Procedure Act, 1852.

Ord. 9.

ORDER IX.

SERVICE OF WRIT OF SUMMONS.

1. *Mode of Service.*

[RULE I.]

Service not
necessary when
defendant
agrees.

1. No service of writ shall be required when the defendant, by his solicitor, agrees to accept service, and enters an appearance.

[RULE II.]

Service to be
personal or
with leave
otherwise.

2. When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or to a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just.

On service generally, it may be well here to give the following remarks :—

Personal
service.

Personal service is made by serving defendant with a copy of the writ, and showing him the original if he desires it (*b*). Putting a copy through a crevice of the door of the room in which the defendant is sitting, and telling him that it is a copy, has been held insufficient (*c*), as has sending a copy by post, in a letter which the defendant refused to take (*d*). If the defendant refuse to take the copy, it is in general sufficient to inform him of its nature, and leave it for him, in his presence, where he may have it (*e*); but this must be under circumstances to bring it within the rule before stated: thus, where the defendant was at an upper window of a house, and the process server who was outside called out to him, telling him he had a writ against him, and held up a copy for him to see, and

Instances.

(*a*) *Re Jones, Eyre v. Cox*, 46 L. J. Ch. D. 316; 25 W. R. 303; W. N. 1877, 38.

(*b*) *Per Alderson, B.*, in *Goggs v. Huntingtower*, 12 M. & W. 503.

(*c*) *Christmas v. Eicke*, 6 D. & L. 156.

(*d*) *Redpath v. Williams*, 3 Bing. 443; 11 Moo. 333; *contra*, *Aldred v. Hicks*, 5 Taun. 186.

(*e*) *Per Patteson, J.*, in *Thompson v. Phenev*, 1 D. P. C. 440.

then threw it down in the presence of defendant's wife, this was held not sufficient (a). So where the person desiring to serve the writ put a copy into a basket which had been put over the garden wall by a servant of the defendant whom he immediately after heard saying to the servant, "Take it back, I won't have it," and the servant afterwards told the person that she had given the copy to the defendant, this was held not good personal service (b). Personal service must of course be made on the defendant himself, not on an agent or near relative (c). It is presumed that where personal service ought to have been made, the law will be unchanged, in cases where it has not actually been made, but where matters are proceeded with as if it had been duly made; that is to say they are irregular, but not necessarily null (d), and the defendant cannot set them aside unless he apply without delay on discovering the irregularity (e). Where the evidence as to the fact of personal service is conflicting, the Court will in general credit the affidavit of the person who has effected the service, so far as to refuse to set aside the proceedings on the mere affidavit of the defendant, that he has not been served (f): he must further show particularly that he has had no notice of the proceedings (g).

The copy of the writ must be left with the defendant (h): even if he refuse to take it, the person serving it should not take it away, or he renders the service bad (i). The original writ need not be shown unless the defendant, within a reasonable time, ask to see it (k); but if within a reasonable time he do ask, and inspection be refused, the service will be bad (l).

Each defendant must be served as if he alone were sued (m), except in the case of husband and wife, when service on the husband is sufficient (n).

Where one or more defendants cannot be served, the rule gives a large discretion to the Court, to order substituted or other service or notice in lieu of service, and in cases of liquidated demand (under O. III., r. 6), the plaintiff may, if he please, proceed with his action against such of the defendants as have appeared to the writ after signing judgment against those who, notwithstanding the Judge's order, have not appeared (o). But as one of several defendants could not sign judgment of *non pros.* because the plaintiff by that is put out of Court altogether (p), so long as the action remains joint, no *non pros.* could be signed; there is therefore no object in going on against them, or obtaining time till the others have been served, except for the purpose of keeping the cause in Court more than a twelvemonth. The action, however, ceased to be joint when the plaintiff had declared, or obtained time to declare, now it is presumed when he has filed, or obtained time to file, his statements against the parties served, and thus treated them as sole defendants (q).

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Ord. 9.

[RULE II.]

Must be on defendant in person.

Want of service irregularity only.

Where evidence as to fact conflicting.

Copy must be left.

As to showing original.

Each defendant must be served.

Where some defendants cannot be served.

(a) *Heath v. White*, 2 D. & L. 40.

(b) *Goggs v. Huntingtower*, 12 M. & W. 503.

(c) *Frith v. Donegal*, 2 D. P. C. 527; *Davies v. Morgan*, 2 C. & J. 237.

(d) *Holmes v. Russell*, 9 D. P. C. 487.

(e) *Willis v. Ball*, 1 Dowl. N. S. 303.

(f) *Johnson v. Smallwood*, 2 D. P. C. 588.

(g) *Morris v. Coles*, 2 D. P. C. 79; *Giles v. Hemming*, 6 D. P. C. 325; *Emerson v. Brown*, 7 Man. & Gr. 476.

(h) *Worley v. Glover*, 2 Str. 877.

(i) *Pigeon v. Bruce*, 8 Taunt. 410.

(k) *Petit v. Ambrose*, 6 M. & S. 274; *Westley v. Jones*, 5 Moo. 162.

(l) *Ib. Thomas v. Pearce*, 2 B. & C. 761.

(m) Pr. Reg. 351.

(n) *Ib. Buncomb v. Love*, Barnes, 406; *Collins v. Shapland*, *ib.* 412.

(o) See notes to O. XIII., r. 4.

(p) *Powell v. White*, 1 Doug. 169; *Roe v. Cock*, 2 T. R. 257.

(q) *Butler v. Upton*, 2 T. R. 258, n.

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[RULE II.]

Service on
corporation.
Publisher of
newspaper.

Trading Com-
pany under
7 Wm. 4 & 1
Vict. c. 73.

Company under
Companies
Clauses Act.

Service on
wrong person.

When service
may be made.

Where the defendant is a corporation, if a corporation sole, personal service was needful; but where a corporation aggregate including companies under the Companies Act (*a*), the service was made on the mayor or other chief officer, or on the town clerk (*b*), treasurer, or secretary: if against the inhabitants of a hundred or other like district, it may be served on the high constable, or on any one of them; and if against the inhabitants of any city or town, or a franchise, liberty, city, town, or place not being part of a hundred or other like district, on some peace officer thereof (*c*). Against any printer, publisher, or proprietor of a newspaper, service at the house or place mentioned in the declaration required by statute 6 & 7 Wm. 4, c. 76, s. 6, as the house or place at which such paper is printed or published or intended so to be, shall be taken to be good and sufficient service against every person named in such declaration as the printer, publisher, or proprietor of the newspaper mentioned in such declaration (*d*); and in an action against a trading or other company or body within the meaning of 7 Wm. 4 & 1 Vict. c. 73, service on the clerk of the company or body, or leaving the writ at the head office for the time being of the company or body, or in case such clerk of the said office shall not be found or known, then service thereof on any agent or officer employed by the said company or body, or by leaving the same at the usual places of abode of such agent or officer, shall be deemed good service on such company or body (*e*).

In an action against any company into whose special Act the provisions of the Companies Clauses Consolidation Act are incorporated, the writ may be served either by being left at, or transmitted through the post directed to, the principal office of the company, or one of them where there are more than one, or by being given personally to the secretary, or in case there be no secretary, then by being given to any one director (*f*). The principal office of a railway company is, for this purpose, where the general government is carried on: service at any other station, no matter how important, is insufficient (*g*). If the line be partly in England, service on a director in England will be good, though the principal office of the company be in Scotland (*h*). If a wrong person be served, notice should be given to him not to appear, and if after such notice, or with full knowledge of the mistake, he appears and takes proceedings to *non pros.* the plaintiff, they will be set aside with costs (*i*), and in some cases to be paid by the attorney (*k*). On the other hand, if he has informed the party serving of the mistake, no further proceedings should be taken against him; in such a case at any rate if his name is different from that in the writ, all such proceedings will be void and no protection even to the sheriff (*l*).

Service may be made at any hour of the day or night (*m*), and on any

(*a*) Service by post would not be good, as the sect. 62 of 25 & 26 Vict. c. 89, the Companies Act, 1862, does not apply to Writs: see *Towne v. The London and Limerick Steamship Co.*, 5 C. B. N. S. 730.

(*b*) Such a clerk must be a principal officer, not a mere clerk in the secretary's office: *Walton v. Universal Salvage Co.*, 16 M. & W. 438, *Semble Writ*, addressed Commissioners for executing the office of Lord High Admiral, must be served on each: *Williams v. The Lords Commissioners of the Admiralty*, 11 C. B. 420.

(*c*) 15 & 16 Vict. c. 76, s. 16; same as 2 Wm. 4, c. 39, s. 13.

(*d*) Section 9.

(*e*) Section 26.

(*f*) 8 & 9 Vict. c. 16, s. 135.

(*g*) *Garton v. Gt. Western Railway Co.*, E. B. & E. 837.

(*h*) *Wilson v. Caledonian Railway Co.*, 5 Ex. 822.

(*i*) *Walker v. Medland*, 1 D. & L. 159; *Richards v. Hanley*, 10 Jur. 1057.

(*k*) *Belcher v. Goodered*, 4 C. B. 472.

(*l*) *Kelly v. Lawrence*, 3 H. & C. 1; 33 L. J. Ex. 197.

(*m*) *Upton v. Muckensie*, 1 D. & R. 172; *Priddee v. Cooper*, 1 Bing. 66.

day not being a Sunday (*a*), or dies non, and not being more than six calendar months (now twelve months, see **O. VIII., r. 1**) from the date of the writ, or six from the date of the last renewal, including the day of such date (*b*). See *ante*, **O. VIII., r. 1**.

The writ of summons in an action may be served in any county (*c*): service on a party while attending in Court in his own cause will not be set aside (*d*).

It may be served by any one who can read, so as to be able to swear to the correctness of the copy; but service by one unable to read is improper (*e*): inability to write is no objection (*f*).

If one wilfully obstruct the execution of the process of the Courts by force or fraud (*g*), or if the defendant upon the service thereof speak contemptuous words of the Court, or of the process, he is liable to punishment by attachment. If the words be of the Court, the rule it seems is absolute in the first instance (*h*); but if of the process, a rule nisi only will be granted (*i*). Tearing in pieces the copy, however, and throwing the fragments at the person serving it, does not amount to a contempt of Court (*k*). Where the defendant, on being served, collared the person serving him and shook him violently and ordered him to quit his presence, the Court of Common Pleas refused a rule for an attachment (*l*). And where a defendant, being shown the original writ, snatched it, out of the hands of the person serving, with great roughness and violence and put it in his pocket, but did not express any contempt, and afterwards gave back the writ, a rule which had been obtained for an attachment was discharged with costs (*m*).

Where personal service was impracticable, formerly the rule was given in 15 & 16 Vict. c. 76, s. 17, which provided that "the service of the writ of summons, wherever it may be practicable, shall as heretofore be personal; but it shall be lawful for the plaintiff to apply from time to time on affidavit to the Court out of which the writ of summons issued, or to a Judge; and in case it shall appear to such Court or Judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such Court or Judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Court or Judge may seem fit." Under this section it was held that the Court would not interfere with the discretion of a Judge in chambers who refused leave (*n*).

It will be seen that much larger discretion is now left to the Court, which under the former rule required evidence not only that reasonable

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Ord. 9.

[RULE II.]

Where.

By whom.

Obstruction of service.

Where personal service impracticable, 15 & 16 Vict. c. 76, s. 17.

Larger discretion in Court now.

(*a*) 29 Car. 2, c. 7, s. 6: service on Sunday is absolutely void and cannot be waived; *Taylor v. Philips*, 3 East, 155.

(*b*) *Anon.*, 1 H. & C. 664; 32 L. J. Ex. 88.

(*c*) 15 & 16 Vict. c. 76, s. 14, before the Common Law Procedure Act, 1852, it could only be served in the county mentioned in the writ, or within 200 yards of the boundary thereof.

(*d*) *Poole v. Gould*, 1 H. & N. 99.

(*e*) *Delafield v. Jones*, Cooke C. P., 3rd ed., 53.

(*f*) *Baker v. Coghlan*, 7 C. B. 131.

(*g*) *Smith v. Bond*, 2 D. & L. 460; 13 M. & W. 594.

(*h*) *Phillips v. Hedges*, Cooke C. P., 3rd ed., 200. It is presumed that R. G. H. 1853, Rule 168, which allows rules absolute in the first instance only in certain cases, does not apply.

(*i*) *Rex v. Jones*, 1 Str. 185; *Anon.*, 1 Salk. 84; 2 Hawk. c. 22, s. 36.

(*k*) *Myers v. Wills*, 4 Moo. 147.

(*l*) *Adams v. Hughes*, 1 B. & B. 24.

(*m*) *Weekes v. Whiteley*, 3 D. P. C. 536.

(*n*) *Tomlinson v. Goatly*, L. R. 1 C. P. 230.

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Ord. 9.

[RULE II.]

Distinction between new and old rule.

In Chancery.

Service of copy of bill.

Decisions upon service since the passing of the Acts.

Orders for substituted service.

efforts to serve had actually been made, but also that the writ had come to the knowledge of the defendant, or that he was wilfully evading service of it and had not appeared to it, all which matters formerly required to be strictly proved.

The new rule, however, which allows a large discretion to the Judge or the Court, as to what may justify the waiver of personal service, makes no such provision as the old rule did for proceeding in the absence of service as though such service had been effected, but allows only an order for substituted or other service, or for the substitution of notice for service as may seem fit.

In Chancery the practice used to be different under the Consolidated Orders of 1860. The service necessary was not of a writ, since the subpoena and summons were abolished by 15 & 16 Vict. c. 86, ss. 2, 3, but of a copy of the bill. Order 10, Rule 1, of the Consolidated Orders, provided that "Service of every copy of a bill shall be effected by serving such copy personally, or by leaving the same with a servant of the defendant, or some member of his family, at his dwelling house or usual place of abode, unless the Court directs some other mode of service."

Formerly where the subpoena used to be served, the writ being enclosed in a letter which the defendant admitted he had received, was held an insufficient service (*a*); but service of a copy of the bill was held sufficient, the defendant having admitted the receipt of it by post (*b*); so by statutes service on a company by post is good service (*c*). The particular decisions on these rules are not now, however, of much use, since the service of the writ is required, and the rule in all the divisions of the Court is the same. For further information as to service under this Act, see **O. IX.**, rr. 10-13, inclusive. As to substituted service, see following **O. X.** In the meantime it may be desirable to notice the decisions upon service under the rules before us since the passing of the Judicature Acts. In the case of *Cook v. Dey* (*d*), it was held that the provision for substitution of notice for service in the latter part of r. 2 does not apply to an ordinary case of an absconding defendant within the jurisdiction. In that case service was ordered to be effected by leaving a copy of it at the lodgings last occupied by the defendant, and at the place where his business was being carried on; and advertisements were directed to be inserted in the *London Gazette* and *The Times*; but the Court declined to make any special order varying the ordinary eight days' time usually fixed by the writ for the appearance of the defendant. The Vice-Chancellor in this case had first refused to make any order for substituted service on the ground that the affidavit did not show there was any probability of the substituted service coming to the knowledge of the defendant (*e*). So in *Dyke v. Shepherd* (*f*), on a motion in the Probate Division, for an order for substituted service, the affidavit (as to which see **O. X.**) merely stated that the defendant was abroad. The President of the Division declined to make the order until further facts were before him showing particularly the difficulties in effecting personal service, &c. He thought also the application should have been in Chambers. Orders for substituted service were made in the cases below mentioned (*g*). Notice in lieu of service was ordered to be given by advertisement and other means where it appeared impossible to effect

(a) *Gathercole v. Wilkinson*, 1 De G. & Sm. 681.

(b) *Burton v. Shaw*, 10 L. T. 292.

(c) 8 Vict. c. 20, s. 138; 25 & 26 Vict. c. 89, ss. 62 & 63; s. 134, 8 Vict. c. 18.

(d) 2 Ch. D. 218; 45 L. J. Ch. D. 611; 24 W. R. 362.

(e) See also *Cowlisbam v. Bowles*, 20 S. J. 312.

(f) 20 S. J. 373.

(g) *Capes v. Brewer*, W. N. 1875, 193; 24 W. R. 40; *Armitage v. Fitzwilliam*, W. N. 1875, 238; *Anon.*, W. N. 1876, 21; 20 S. J. 242.

service in the case mentioned below (a). In a case where the defendant, the collector of rents of certain leasehold houses, had absconded and could not be found, and the tenants of the houses refused to pay their rents, the Court directed substituted service of the writ of summons to recover possession of the houses to be effected by leaving a copy of the writ at each of the houses, and by inserting advertisements in the *London Gazette* and in *The Times*. In such case, if no special direction is given as to the time, the ordinary eight days only will be allowed from the time of serving the copies of the writ or issuing the advertisements, whichever was done last (b). In a foreclosure action, a motion was made for the appointment of a receiver before service of the writ, and Vice-Chancellor Hall was applied to for directions as to the mode of effecting substituted service; the Vice-Chancellor made the order for a receiver, and directed the writ to be served upon the wife of the defendant, and notice of it to be advertised in the *London Gazette* and *The Times*, the advertisements to give notice that in default of appearance the plaintiff would move for judgment at such time and place as might be proper (c). On a motion in the Probate Division for an order for substituted service of writ of summons upon one of the defendants, a son-in-law of the testatrix: his wife was contesting the will of her mother on the ground of her intestacy, but she and her husband were living apart, and neither the wife nor the husband's solicitors knew his address. The President granted the application, and ordered service by advertisement of the writ subject to the directions of the Registrar (d). No procedure now can be had in the absence of service; there must be an order for substituted service if personal service cannot be effected (e). Substituted service cannot be allowed where direct service could not possibly be effected (f). In the case just cited it was held that the Government of New Zealand was not a corporation liable to be sued as such in the High Court of Justice. Judgment under the Bills of Exchange Act, signed before the time limited for appearance in order for leave for substituted service (which must be reckoned from the date of the taking effect of the order for substituted service, see *Crane v. Jullion* (b),) was set aside, and leave to defend given as though time were still running (g). On an application for substituted service of notice of application for an attachment, Denman, J., said he knew of no power to order substituted service on defendant of anything save a writ of summons in an action (h).

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[RULE II.]

2. On particular Defendants.

3. When husband and wife are both defendants to the action, service on the husband shall be deemed good service on the wife, but the Court or a Judge may order that the wife shall be served with or without service on the husband.

[RULE III.]

Where husband
and wife are
both defen-
dants.

(a) *Raphael v. Ongley*, 34 L. T. N. S. 124; 20 S. J. 312; see also *Cook v. Dey*, *supra*.

(b) *Crane v. Jullion*, 2 Ch. D. 220; where form of the order given, 24 W. R. 691.

(c) *Bank of Whitehaven v. Thompson*, W. N. 1877, 45; 21 S. J. 278.

(d) *Whitley v. Honeywell*, 35 L. T. N. S. 517; 24 W. R. 851.

(e) *Anon.*, W. N. 1875, 202; 20 S. J. 57.

(f) *Sloman v. Governor and Government of New Zealand*, 1 C. P. D. 563; 46 L. J. (App.) C. P. D. 185; 35 L. T. N. S. 454; 25 W. R. 86.

(g) *Johnson v. Moffat*, W. N. 1875, 248; 20 S. J. 139.

(h) *Anon.*, W. N. 1876, 105; 23 S. J. 341; but see note, r. 4; *Jackson v. Jackson*, 20 S. J. 871.

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[RULE III.]

On this rule, see the case of *Whitley v. Honeywell* (a), mentioned in note on last rule. A wife was contesting the will of her mother on the ground of intestacy, and her husband was a defendant to the suit; she and her husband were living apart, and neither she nor her husband's solicitors knew where his address was. The President of the Probate Division ordered substituted service upon the husband by advertisement of the writ, subject to the directions of the Registrar.

[RULE IV.]

Where infant defendant.

4. When an infant is a defendant to the action, service on his or her father or guardian, or if none, then upon the person with whom the infant resides or under whose care he or she is, shall, unless the Court or Judge otherwise orders, be deemed good service on the infant; provided that the Court or Judge may order that service made or to be made on the infant shall be deemed good service.

Though all the Rules of this Order in terms refer only to service of writs of summons (b), yet in an action by a father against his infant son, who was residing with his mother apart from the plaintiff, an order was made that service of notice of motion of an application to appoint a guardian *ad litem* to the defendant upon the mother, should be sufficient service within O. XIII., r. 1, and leave was given to serve notice of motion for an injunction on the infant in terms of this r. 4 of O. IX. (c).

[RULE V.]

Where lunatic or person of unsound mind defendant.

5. When a lunatic or person of unsound mind, not so found by inquisition, is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides or under whose care he or she is, shall, unless the Court or Judge otherwise orders, be deemed good service on such defendant.

3. On Partners and other Bodies.

[RULE VI.]

Where partners sued in name of firm.

6. Where partners are sued in the name of their firm, the writ shall be served, either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm.

The following has been introduced by Rules of the Supreme Court, June, 1876 :—

[RULE VIA.]

Where one person

6A. Where one person carrying on business in the name

(a) 35 L. T. N. S. 517; 24 W. R. 851.

(b) See note to r. 2, *Anon.*, per Denman, J.

(c) *Jackson v. Jackson*, 20 S. J. 871.

of a firm apparently consisting of more than one person shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on upon any person having at the time of service the control or management of the business there; and, subject to any of the Rules of the Supreme Court, such service shall be deemed good service on the person so sued.

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[RULE VIA.]
carrying on
business in the
name of a firm
sued in firm's
name.

It was held before the publication of this new rule that rule 6 did not apply where the action on a bill of exchange was brought under the Bills of Exchange Act, and that personal service was there still necessary on the defendants (*a*), and it is presumed the new rule will not alter the practice in this case. See *O'Neil v. Clason*, 46 L. J. Q. B. D. 191, as to the defendant himself being out of the jurisdiction.

7. Whenever, by any statute, provision is made for service of any writ of summons, bill, petition, or other process upon any corporation, or upon any hundred, or the inhabitants of any place, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons may be served in the manner so provided.

[RULE VII.]

Statutory provisions for service in case of corporations, &c., retained.

4. *In particular Actions.*

8. Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property.

[RULE VIII.]

Service where action to recover vacant land.

It has been held that service of writ in this manner will not entitle plaintiff to sign judgment in ejectment without an order, and that r. 112 of Hilary Term, 1853, remains in force (*b*). In such a case, see *Crane v. Jullion* (*c*), *ante*, p. 187.

9. *This Rule was annulled by Rules of the Supreme Court, December, 1875, as follows:—*

[RULE IX.]

Order IX., Rule 9, of "The Rules of the Supreme Court," is hereby annulled, and the following shall stand in lieu thereof:—

"In Admiralty actions *in rem* the warrant of arrest shall be served by the Marshal or his substitutes, whether the

Service in Admiralty actions *in rem*, by Marshal, &c.

(*a*) *Pollock v. Campbell*, 1 Ex. D. 50; 45 L. J. Ex. D. 199; 34 L. T. N. S. 360; 24 W. R. 320; see **O. XVI., r. 10.**

(*b*) *Anon.*, 20 S. J. 33.

(*c*) 2 Ch. D. 220; 24 W. R. 691.

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[RULE IX.]

property to be arrested be situate within the port of London or elsewhere within the jurisdiction of the Court, and the Solicitor issuing the warrant shall, within six days from the service thereof, file the same in the Registry."

[RULE X.]

10. *This Rule was annulled by Rules of the Supreme Court, December, 1875, as follows:*

Order IX., Rule 10, of "The Rules of the Supreme Court," is hereby annulled, and the following shall stand in lieu thereof:—

Mode of effect-
ing service.

"In Admiralty actions *in rem*, service of a writ of summons against ship, freight, or cargo on board, is to be effected by nailing or affixing the original writ for a short time on the mainmast, or on the single mast of the vessel, and on taking off the process, leaving a true copy of it nailed or fixed in its place."

[RULE XI.]

Where cargo is
not on board,
mode of arrest-
ing it and
freight.

11. If the cargo has been landed or transhipped, service of the writ of summons to arrest the cargo and freight shall be effected by placing the writ for a short time on the cargo, and on taking off the process by leaving a true copy upon it.

These rules are rather vague in requiring the original writ to be nailed or affixed to the mast, or placed on the cargo *for a short time*. What is a short time, and why should it be thus nailed, affixed, or placed at all? We should have thought that the principle of r. 6 had much better have been followed in such cases, *i.e.*, where the matter on which the service was actually to be effected was inanimate, the fixing a copy alone should be sufficient. If anything further were required, the showing the original to anyone requiring to see it during a reasonable time might be expedient; but we can see little reason in the form required by these rules.

[RULE XII.]

Where cargo is
in custody of
guardian re-
fusing access.

12. If the cargo be in the custody of a person who will not permit access to it, service of the writ may be made upon the custodian.

Generally.

[RULE XIII.]

Person serving
to indorse on
writ day of
month and
week on which
it was served.

13. The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made.

This rule is almost verbatim s. 15 of the Common Law Procedure Act, 1852, and precisely to the same effect.

Under the practice before 1852, which resembled it somewhat, where the person who made the service died within the three days, a Judge in chambers, upon an affidavit of the plaintiff's attorney of the facts and his belief of the service, ordered an appearance to be entered; *see stat.* without such endorsement (*a*). And where the prescribed time had been allowed to elapse owing to the falsehood of the defendant in denying that he was the party named in the writ, an appearance *sec stat.* was allowed to be entered without it (*b*). But under that practice the time within which the indorsement should be made was not fixed by statutory authority, though the making of the indorsement was required by statute. Where the defendant snatched the writ out of the hand of the party serving it, a rule was granted that he should deliver it up, that the time for appearing should be computed from the time when he got possession of it, and that in default of his delivering it up, the plaintiff should be at liberty to enter an appearance without any indorsement, and that the defendant should pay the costs (*c*). The indorsement was sufficient where it was either printed or written by a stranger, if signed or attested by the mark of the process server (*d*).

It had been held by the Master of the Rolls under this rule that it applied whether the writ had been served personally or by substituted service (*e*), and that plaintiff was not at liberty to proceed by default in either case, unless the date of the service had been indorsed on the writ; but on appeal (*f*) this decision was overruled and a prior decision of Huddleston, B., followed, viz., *Cruse v. Kettingwell* (*g*), holding that the rule was only applicable in cases of personal service, and that in cases of substituted service it was sufficient to file affidavit of service, on production whereof judgment would be ordered to be signed.

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[RULE XIII.]

Old practice
before 1852.

ORDER X.

Ord. 10.

SUBSTITUTED SERVICE.

Every application to the Court or a Judge, under Order IX., Rule 2, for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made.

Application for
substituted
service, &c., to
be supported
by affidavit.

With reference to this Order, see also the cases just above mentioned, *Dymond v. Croft* (*f*) and *Cruse v. Kettingwell* (*g*).

ORDER XI.

Ord. 11.

SERVICE OUT OF JURISDICTION.

1. Service out of the jurisdiction of a writ of summons

[RULE I.]

Service out of

(*a*) Lush's Pr., vol. 1., p. 374.

(*b*) *Burrows v. Gabriel*, 4 D. & L. 107.

(*c*) *Brook v. Edridge*, 2 D. P. C. 647.

(*d*) *Baker v. Coghlan*, 7 C. B. 131.

(*e*) *Dymond v. Croft*, W. N. 1876, 193, 196; 24 W. R. 818.

(*f*) S. C. on appeal, 3 Ch. D. 512; 45 L. J. Ch. D. 604; 34 L. T. N. S. 786; 24 W. R. 842.

(*g*) W. N. 1875, 250; 20 S. J. 141.

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[RULE I.]

jurisdiction,
when allowed.

or notice of a writ of summons may be allowed by the Court or a Judge whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered was or is to be done or is situate within the jurisdiction.

See note,
Order II.,
Rule 4.

This rule is one to which constant reference must be made, and on which it is hopeless to write an exhaustive note until it shall have been for a long time the subject of decision. In our comments on O. II., r. 4, the questions arising on service out of the jurisdiction are discussed at some length, and indeed this rule seems to be intended as a definition of the cases in which the cause of action has arisen within the jurisdiction, or is properly cognizable against a defendant within the jurisdiction. In this sense it seems at first sight very fairly comprehensive of the cases in which defendants abroad should be adjudicated against at home; but it is only practice which can test its sufficiency.

Cases under
this rule.

On the first enactment of these Acts and Rules this rule obtained a very large operation. Service out of the jurisdiction was allowed against a defendant in Scotland on a breach of contract for payment of money to be sent direct to Deptford (*a*); so service in Scotland was held good in an action for not unloading ship, the sale to the parties served of the cargo to arrive having been made at Liverpool (*b*). So an order allowing service of writ in Ireland was held good (*c*), and service on foreign corporations out of the jurisdiction has been held good (*d*).

Where the party proceeded against is not a British subject, it was held that s. 19 of the Common Law Procedure Act, 1852, prevails, and that service must be not of writ but of notice of writ (*e*).

The general affidavit that the cause of action arose within the jurisdiction is not now sufficient; the particulars to be deposed to are shown by the rule (*f*).

Since Her Majesty has been made Empress of India a doubt has arisen whether a writ for service out of the jurisdiction should have her title as *Indiæ Imperatrix* added (*g*). On this matter application was directed to

(*a*) *Preston v. Lamont*, 1 Ex. D. 361; 45 L. J. Ex. D. 797; 35 L. T. N. S. 341; see also S. C., 24 W. R. 928; W. N. 1876, 212.

(*b*) *Swansea Shipping Co. v. Duncan, Fox, & Co.*, 1 Q. B. D. 644; 45 L. J. Q. B. D. 638; 35 L. T. N. S. 879; 25 W. R. 233.

(*c*) *Green v. Browning*, W. N. 1876, 190; 34 L. T. N. S. 760; 20 S. J. 604.

(*d*) *Scott v. The Royal Wax Candle Co.*, 1 Q. B. D. 404; 45 L. J. Q. B. D. 586; 34 L. T. N. S. 683; 24 W. R. 668; see O. II., r. 3a.

(*e*) *Beddington v. Beddington*, 1 P. D. 426; 45 L. J. P. D. A. 44; 34 L. T. N. S. 366; 24 W. R. 348.

(*f*) *Anon.*, W. N. 1875, 202; 20 S. J. 57.

(*g*) *Bacon v. Turner*, 3 Ch. D. 275; 34 L. T. N. S. 647; 24 W. R. 637.

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[RULE I.]

the Lord Chancellor, but with what result we have been unable to find with certainty.

In the case of *Harris v. The Owners of the Franconia*, it was held that the ordinary Courts of the country have no jurisdiction over acts done by foreigners on the high seas below low-water mark : consequently this rule does not warrant an order for service of a writ on a foreigner residing abroad in respect of a cause of action arising at sea below low-water mark, though within three miles of English coast (*a*). It has been held that the Court has jurisdiction to order service of a summons under the Companies Act, 1862, ss. 100 and 165, upon respondents out of the jurisdiction, under this rule and r. 4 (*b*).

The cases of *Westman v. Aktiebolaget Ekmans Mekaniska Snickarefabrik* (*c*), *In the Goods of Chamberlayne* (*d*), and *Re Smith* (*e*), already cited in notes to O. II., r. 4, may be worthy of notice under this rule also. It was held by Malins, V.-C., if the Court be satisfied that plaintiff has stated a case, which if proved, would entitle him to decree, any defendant resident out of the jurisdiction, being a British subject, against whom relief is prayed, may be served out of the jurisdiction with a writ; but on appeal the case was overruled, and it was held that the affidavit showing thus much only was insufficient, and that to justify an order for leave to serve out of the jurisdiction, there must be an affidavit by some person able to depose to the facts, that he is advised and believes there is a good cause of action arising within the jurisdiction, and stating in distinct terms what the cause of action is (*f*). The necessary affidavit having been supplied the Court allowed the Vice-Chancellor's order to stand (*g*).

The decisions as to the service of writs in Ireland excited great opposition in that country, and in consequence of the objections expressed by solicitors in Ireland to the rule as it stood, the following rule has been enacted for insertion here by the Rules of the Supreme Court, June, 1876 :—

1A. Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract wherever made, the Judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding

[RULE 1A.]

Leave not to be granted without affidavit stating particulars.

(*a*) 2 C. P. D. 173 ; 46 L. J. C. P. D. 363.

(*b*) *Re British Imperial Corporation*, 5 Ch. D. 749 ; 25 W. R. 583.

(*c*) 1 Ex. D. 237 ; 45 L. J. Ex. D. 327 ; 24 W. R. 405.

(*d*) 20 S. J. 373.

(*e*) 1 P. D. 300 ; 45 L. J. P. D. A. 92 ; 35 L. T. N. S. 380 ; 24 W. R. 903.

(*f*) *Great Australian Mining Co. v. Martin*, 5 Ch. D. 1 ; 46 L. J. (App.) Ch. D. 289 ; 35 L. T. N. S. 874 ; 25 W. R. 246 ; *Anon.*, W. N. 1875, 199.

(*g*) W. N. 1877, 27.

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[RULE IA.]

in England or in the place of such defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the Judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shown.

Since the enactment of this rule an application was made to serve writ in Ireland in an action for slander of title in stating the ship of the plaintiff was unseaworthy. The ship was in an English port, the defendant being in Ireland. The Court held it was not a proper case for service abroad (a).

Application to discharge an order for service of writ of summons in *Mackenzie v. Shepherd* (b) on the defendant Henderson out of the jurisdiction. Henderson had not appeared, and a conditional appearance was entered for him by the Registrar in Court to enable the motion to be brought on. The action was by Mrs. Mackenzie to have a trust deed of voluntary settlement made by her in Edinburgh, in Scotch form, set aside on the ground of fraud. It had been prepared and executed in Scotland, and she was at the time of execution a domiciled Scotchwoman. Defendant Henderson, who was one of the trustees, was a domiciled Scotchman, and a solicitor of the Supreme Court of Scotland, resident in Edinburgh; the other trustee was a Scotchman by birth, resident and carrying on business at Cognac, in France, having also a place of business in London. The plaintiff and her husband had lived in London since their marriage, but the husband was an infant. On the 11th Jan. plaintiff had obtained leave to serve the writ on the defendant Henderson out of the jurisdiction, on the ground that part of the property comprised in the settlement was within the jurisdiction, viz., debenture bonds of the Otago and Southland Investment Co., Limited, having its registered office and carrying on business in London; but the bonds were in the possession of Henderson in Scotland, and none of the parties were resident in England except the plaintiff and her husband, while all the material witnesses resided in Scotland, and one was so old and infirm as to be unable to travel to London. Hall, V.-C., said that possibly the order might have been within r. 1, but he thought he could not have seen the settlement when he made the order. Substantially the action was to set aside a Scotch settlement made by persons resident in Scotland, and even if conducted here would require to have a case sent for trial in Scotland. The balance of convenience was certainly against a trial in London, and the order must be discharged.

[RULE II.]

In Probate
actions may be
allowed.

2. In probate actions service of a writ of summons or notice of a writ of summons may by leave of the Court or Judge be allowed out of the jurisdiction.

Rule seems too
vague.

In most probate actions no doubt this rule will do well; but we should be slow to say that the mere fact of the action being one of probate should be in itself sufficient to allow service abroad, unless the case were one in which the administration of the deceased's estate would be better effected in this country than abroad. It is true that the leave of the Court or a Judge is by the rule required; but no direction is given by the

(a) *Casey v. Arnott*, 2 C. P. D. 24; 46 L. J. C. P. D. 3; 35 L. T. N. S. 424; 25 W. R. 46.

(b) 21 S. J. 339.

rule as to the terms on which that leave should be given, and there can be no reference allowed to the first rule of the order, for the second would be unmeaning in mentioning probate cases which without that mention would be included in the first rule, if it were not, by their notice in the second rule, intended to make them subject to some rule other than the first.

See *In the Goods of Chamberlayne* (a) before cited in notes to O. II., r. 4. Where one of several defendants is a foreigner resident abroad, the course is to take out a concurrent writ, and serve a notice of it on the said defendant (b).

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[RULE II.]

3. Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made.

[RULE III.]

Application for leave to serve thus to be supported by affidavit.

On this rule, see cases (f) and (g) under r. 1, and *Randall v. Campbell* (c). When service allowed, see r. 1, ante. For substitution, see O. IX., r. 2.

4. Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.

[RULE IV.]

Order giving such leave to limit time for appearance.

If the order under this rule allows more than eight days for appearance then r. 20, of O. XVI. must be modified to meet the case, and the party cited will be in time if he enter appearance within the time allowed under this rule, though beyond the eight days (d). See on this rule *Re British Imperial Corporation* (e).

5. Notice in lieu of service shall be given in the manner in which writs of summons are served.

[RULE V.]

Notice in lieu of service.

As to the method of service, see notes on O. II., r. 4, p. 158, *et seq.*

ORDER XII.

APPEARANCE.

Ord. 12.

1. Except in the cases otherwise provided for by these Rules a defendant shall enter his appearance in London.

[RULE I.]

Appearance to be entered in London.

(a) 20 S. J. 373.

(b) *Beddington v. Beddington*, 1 P. D. 426; 45 L. J. P. D. A. 44; 34 L. T. N. S. 366; 24 W. R. 348.

(c) W. N. 1877, 201.

(d) *Swansea Shipping Co. v. Duncan, Fox & Co.*, 1 Q. B. D. 644; 45 L. J. Q. B. D. 423, 638; 34 L. T. N. S. 685; 35 L. T. N. S. 879; 25 W. R. 233.

(e) *Ante*, p. 193, 5 Ch. D. 749; 25 W. R. 583.

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COURT.

Ord. 12.

[RULE II.]

2. If any defendant to a writ issued in a district registry resides or carries on business within the district, he shall appear in the district registry.

This rule seems the only one in which appearance in the district is imperative. **R. 5** is ancillary to it : see however **O. XXXV.** as to proceedings in district registries.

[RULE III.]

Option where
defendant
neither resides
nor carries on
business in
district.

3. If any defendant neither resides nor carries on business in the district, he may appear either in the district registry or in London.

In the case of *Oger v. Bradnum* (a), it was held that a writ under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), may issue out of a district registry ; and, in that case, notwithstanding neither party resides or carries on business within the district, the notice may require the defendant to apply for leave to appear, and to appear in the district registry without suggesting that he may obtain leave to appear in London. Where, however, a defendant is served with a writ issued out of a district registry, within the jurisdiction of which he neither resides nor carries on business, he may (under **O. XXXV. r. 1**) obtain an order of the Court or a Judge to have the subsequent proceedings taken in London. See **O. V., r. 2**, and **O. XXXV., r. 1**, now **O. XXXV., r. 1a**.

A cause *in rem* was instituted in the Liverpool district : the defendants were allowed to appear in London, but it was ordered that the *præcipe* for appearance should contain a recital of the institution of the cause in Liverpool showing the title of the cause in Liverpool (b).

Though this rule allows option of place for appearance to the defendant, yet he may prejudice himself by his own action, as in the case before cited in note (a) to **O. II., r. 6**, *ante*, pp. 163—164.

An action was instituted under the Bills of Exchange Act in the Sheffield District Registry : the defendant had appeared both in London and Sheffield, and had obtained leave to defend on paying £40 into Court. The money was paid in, not in Sheffield but in London, and judgment was signed and execution issued for noncompliance with the condition. It was held that the defendant appearing in Sheffield had waived his right to object to the action being carried on there, and he was only allowed anew to defend on further conditions (c).

[RULE IV.]

Where appear
ing defendants
appear in
district.

4. If a sole defendant appears, or all the defendants appear in the district registry, or if all the defendants who appear appear in the district registry and the others make default in appearance, then, subject to the power of removal hereinafter provided, the action shall proceed in the district registry.

The defendants in an action had appeared in Manchester, as they said by mistake of their agent, to a writ issued in Manchester ; a summons for

(a) *Ante*, p. 174, 1 C. P. D. 334 ; 45 L. J. C. P. D. 273 ; 34 L. T. N. S. 578 ; 24 W. R. 404.

(b) *The General Birch*, W. N. 1875, 198 ; 33 L. T. N. S. 792 ; 24 W. R. 24.

(c) *Ibbotson v. Whitworth*, W. N. 1876, 10 ; 20 S. J. 217.

time had been there taken out by them on which they had obtained an order; while it was running they took out a summons in London for seven days' further time to plead. Per Denman, J., "The defendants cannot disavow the act of their agent at Manchester; if they wished the proceeding to be carried on in London they should have given notice and proceeded under **O. XXXV.**, rr. 11 and 12 (which see). I will let the master's order which allowed them seven days' time stand, but making the defendants pay all the costs. The cause must be removed to London. Costs of all proceedings in the District Registry after writ and of this application and that before the Master to be plaintiff's in any event" (a).

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COURT.

Ord. 12.

[RULE IV.]

5. If the defendant appears, or any of the defendants appear, in London, the action shall proceed in London; provided that if the Court or a Judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or Judge may order that the action may proceed in the district registry, notwithstanding such appearance in London.

[RULE V.]

If any defendant appears in London.

6. *Annulled by Rules of the Supreme Court, February, 1876.*

[RULE VI.]

It was held under this rule before its abrogation, reference being made to the Rules of Dec., 1875, r. 7, which see, that notice to the agent in London of the plaintiff was good notice of appearance (b); but now see Rules Feb., 1876, r. 5, which is as follows:—

6A. Order XII., Rule 6, is hereby annulled, and the following shall stand in lieu thereof:

[RULE VIA.]

"A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing, dated on the day of delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person.

Appearance,
how to be
entered.

"A defendant who appears elsewhere than where the writ is issued, shall on the same day give notice of his appearance to the plaintiff's solicitor or to the plaintiff himself if he sues in person, either by notice in writing served in the ordinary way at the address for service within the district of the district registry, or by prepaid letter directed to such address, and posted on that day in due course of post."

Defendant
appearing else-
where than
where writ
issued.

7. The solicitor of a defendant appearing by a solicitor,

[RULE VII.]

Defendant's

(a) *Anon.*, W. N. 1876, 105; 20 S. J. 341.

(b) *Johnson v. Whitehead*, W. N. 1876, 10; 20 S. J. 217.

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COURT.

Ord. 12.

[RULE VII.]

solicitor to
state in memo-
randum address
for service.

shall state in such memorandum his place of business, and, if the appearance is entered in the London office, a place, to be called his address for service, which shall not be more than three miles from Temple Bar, and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district.

The old rule, Common Law Procedure Act, 1852, s. 31, required a form containing much the same as what is now required by this and the succeeding rules. It was no doubt supplemented by Rules of Court of 1853, but in the case of appearance by attorney, required no place of address nor address for service, which is provided for by r. 7; but, on the whole, the form required now, by r. 10, varies from it considerably.

[RULE VIII.]

Defendant
appearing in
person to state
address and
address for
service.

8. A defendant appearing in person shall state in such memorandum his address, and, if the appearance is entered in the London office, a place, to be called his address for service, which shall not be more than three miles from Temple Bar, and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district.

[RULE IX.]

Penalty for
default of
address.

9. If the memorandum does not contain such address it shall not be received; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a Judge, on the application of the plaintiff.

Former rule.

The rule formerly was much the same (Common Law Procedure Act, 1852, s. 30), but it allowed further that the plaintiff might be permitted to proceed by sticking up the proceedings in the Master's office without further service.

[RULE X.]

Form of memo-
randum of
appearance.

10. The Memorandum of Appearance shall be in the Form No. 6, Appendix (A), Part I., with such variations as the circumstances of the case may require.

[RULE XI.]

Officer to enter
appearance in
cause book.

11. Upon receipt of a Memorandum of Appearance, the officer shall forthwith enter the appearance in the cause book.

[RULE XII.]

Appearance
where partners
sued in name
of firm.

12. Where partners are sued in the name of their firm, they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm.

The following rule is here inserted by Rules of the Supreme Court, June, 1876:—

[RULE XIIA.]

12A. Where any person carrying on business in the name

of a firm apparently consisting of more than one person shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

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COURT.

Ord. 12.

[RULE XIIA.]

13. If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum.

[RULE XIII.]

Two or more
defendants
appearing by
same solicitor,
to be named in
one memo-
randum.

This rule is practically the same as formerly, R. G. H. 1853, r. 2.

14. A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant shall be liable to an attachment.

[RULE XIV.]

Solicitor failing
to fulfil under-
taking to enter
appearance
may be
attached.

Former rule.

This also was law formerly, R. G. H. 1853, r. 3, though the attachment did not in general follow immediately, at least in vacation, when the ordinary course was to take out a summons calling on him to show cause why he should not forthwith enter an appearance and pay the costs of the application; then, if he failed to obey the order, it was made a rule of Court as of course upon motion in the following term (*a*), costs taxed, a copy of the rule and allocation served, a demand made, and a rule nisi for an attachment obtained (*b*). Otherwise it was necessary first to obtain a rule that he should show cause why he should not enter an appearance. He should, before the rule for an attachment was moved, have first been requested to enter an appearance (*c*). As to entering appearance see **O. IX.**, r. 1. If it was desired to obtain the cost of making the order a Rule of Court, it was necessary to file an affidavit that the order had been served and disobeyed (*d*). No attachment could have been obtained merely for delay, by which the appearance had not been entered in time; but where the breach in the attorney's undertaking prevented the plaintiff from trying the cause at the next assizes, and he moved in consequence to change the venue to Middlesex, Williams, J., sitting in the Bail Court, discharged that rule, but ordered the defendant's attorney to pay the costs of the application, and also it is said to pay into Court the amount of the plaintiff's demand (*e*); but on this there is some doubt, for the reporters differ on it (*f*).

It was in a case since the passing of the Acts held that though the solicitor of a defendant in an Admiralty cause had written a letter in the first instance undertaking to appear for his client, as it appeared that when the letter was written the solicitor was in ignorance of the nature of the claim made by the action; this circumstance did not invalidate an appearance under protest for the purpose of disputing the jurisdiction, and did not bind the defendant to appear unconditionally (*g*).

(*a*) *Wilson v. Northop*, 2 C. M. & R. 326; *Black v. Lowe*, 4 D. & L. 285; see *Rex v. Price*, 2 D. P. C. 233; R. G. H. 1853, Rule 158.

(*b*) See *Chilton v. Ellis*, 2 D. P. C. 338.

(*c*) *Jacob v. Magnay*, 12 L. J. Q. B. 93.

(*d*) R. G. H. 1853, Rule 159; *Black v. Lowe*, 4 D. & L. 285.

(*e*) *Morris v. James*, 2 Jur. 842.

(*f*) Compare, S. C. 6 D. P. C. 514.

(*g*) *The Vivar*, 2 P. D. 29; 35 L. T. N. S. 782; 25 W. R. 453.

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Ord. 12.

[RULE XV.]

Defendant
appearing after
time to give
notice.

15. A defendant may appear at any time before judgment. If he appear at any time after the time limited for appearance he shall, on the same day, give notice thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, and he shall not, unless the Court or Judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ.

Common Law
Procedure Act,
1852, sect. 29.

This rule in some respects varies the former rule (Common Law Procedure Act, 1852, s. 29), but is substantially much to the same effect.

[RULE XVI.]

In Probate any
one may inter-
vene on affi-
davit.

16. In Probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit showing how he is interested in the estate of the deceased.

[RULE XVII.]

Like rule in
Admiralty.

17. In an Admiralty action in rem any person not named in the writ may intervene and appear as heretofore, on filing an affidavit showing that he is interested in the res under arrest, or in the fund in the Registry.

[RULE XVIII.]

Person in
possession of
land may inter-
vene in action
for recovery of
land.

18. Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or Judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.

This rule is taken from the Common Law Procedure Act, 1852, s. 172.

[RULE XIX.]

Person appear-
ing as landlord
in such suit to
state in his
appearance
that he does so.

19. Any person appearing to defend an action for the recovery of land as landlord in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord.

This is taken from the Common Law Procedure Act, 1852, s. 173.

[RULE XX.]

Person not
named as de-
fendant in such
suit obtaining
leave to de-
fend, how to
enter appear-
ance and what
notice to give.

20. Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or Judge to appear and defend, he shall enter an appearance according to the foregoing rules, intituled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he

sues in person, and shall in all subsequent proceedings be named as a party defendant to the action.

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COURT.

Ord. 12.

[RULE XX.]

There seems no good reason why this rule should not extend to the cases dealt with by rr. 16 and 17 as well as r. 18, save that it is closely modelled on R. G. H. 1853, r. 113, which applies only to cases of ejection.

21. Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance or in a notice intituled in the cause, and signed by him or his solicitor; such notice to be served within four days after appearance; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole.

[RULE XXI.]

Person appearing in suit for recovery of land may limit defence to part of the land.

This rule is taken from the Common Law Procedure Act, 1852, s. 174.

22. The Notice mentioned in the last preceding rule may be in the Form No. 7 in Part I. of Appendix (A) hereto, with such variations as circumstances may require.

[RULE XXII.]

Form of notice.

ORDER XIII.

DEFAULT OF APPEARANCE.

Before beginning to give the rules under this Order, and notes on them, it may be convenient to give a synopsis of the practice in the Chancery Division as to judgment in default, and first in case of a liquidated demand (a).

Ord. 13.

The writ having been issued and served, the plaintiff's solicitor waits the time (eight days) within which defendant may appear. He then may procure from the Record and Writ Clerk a certificate of non-appearance. Having previously indorsed his writ with the day of service in due time, (O. IX., r. 13), he makes his affidavit of service, which he files (O. XIII., r. 2), and of which he takes an office copy. A printed form of the judgment (Appendix D 1) is then filled up by the solicitor, and with this and the writ certificate and office copy affidavit, and, if necessary, a certificate of the lower scale, he goes to the Registrar. If he has also provided himself with a second printed form of the judgment he may (upon the Registrar signing judgment) get the original entered on the record while he waits. Otherwise it may be had from the entering seat the next morning. The judgment will be dated as of the day on which it is signed, and will be for the amount indorsed on the writ, and interest, if any, at the rate claimed, calculated up to the day of signing judgment. The judgment may also be for the amount of costs endorsed on the writ (O. XIII., r. 3), or it may be simply "costs to be taxed." The stamp on the judgment will be 10s. for the lower scale, and £1 for the higher. This

(a) See 20 S. J. 171, from which this synopsis is taken.

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Chancery
Division.

is the practice so far as was established up to the beginning of 1876, when it was new in Chancery, and we do not know that it has been materially changed since.

As to judgment generally in default in the Chancery Division, the following official statement, also taken from the Solicitors' Journal, Vol. XX., p. 702, is worthy of note, though in some points similar to those already noted.

JUDGMENT IN DEFAULT IN CHANCERY DIVISION.

I. Judgment in default of appearance may be entered—(1.) Where the writ of summons is specially indorsed (under **O. III.**, r. 6), **O. XIII.**, rr. 3, 4. (2.) Where it is not specially indorsed, **O. XIII.**, rr. 5, 6, 7, and 8. (3.) In actions under the Bills of Exchange Act (18 & 19 Vict. c. 67), **O. II.**, r. 6, judgment in default of appearance cannot be entered in any action specially assigned to the Chancery Division by the Judicature Act, 1873, s. 34, **O. XIII.**, r. 9.

II. Judgment in default of pleading may be entered in actions for—(1.) Debt or liquidated demand, **O. XXIX.**, rr. 2 and 3. (2.) Detention of goods and pecuniary damages, or either of them, **O. XXIX.**, rr. 4 and 5. (3.) Debt or liquidated demand, and also detention of goods and damages, or damages only, **O. XXIX.**, r. 6. (4.) Recovery of land, **O. XXIX.**, r. 7. (5.) And also where the writ for recovery of land is endorsed for mesne profits, arrears of rent, or damages for breach of contract, **O. XXIX.**, r. 8.

Where the plaintiff's claim is for a debt or liquidated demand, or for the recovery of land, the judgment is final; where it is for detention of goods, damages, mesne profits, or arrears of rent, it is interlocutory (Form 5). In the latter case, after damages, &c., have been ascertained, final judgment can be entered according to Form 8 in Schedule. (For the forms mentioned herein, see pp. 204, 205.)

I. DEFAULT OF APPEARANCE.—The solicitor applying to enter final or interlocutory judgment in default of appearance must produce:—

- (1.) *The Original Writ.*—If the application is under **O. XIII.**, r. 3 or 4, the special indorsement on the writ should be as provided by **O. III.**, r. 6. For the form of such special indorsement, see Appendix A, Part II., Sec. VII.; and if the claim is for a debt or liquidated demand only, there must also be the indorsement directed by **O. III.**, r. 7. As to costs see Appendix A, Part II., Sec. III. If under the Bills of Exchange Act, the writ should be in the special form contained in Sched. A to that effect, and indorsed as therein mentioned.
- (2.) *The Original Affidavit of Service.*—An affidavit of service is required, **O. IX.**, r. 13, and must show the day on which service was effected, which must be eight clear days, or in cases under the Bills of Exchange Act, twelve clear days before entering judgment. The affidavit must also show the day on which the indorsement of service (where necessary) was made on the writ, and that such indorsement was made within three days at most after service, **O. IX.**, r. 13. Service of the writ must be personal unless substituted or other service be ordered (**O. IX.**, r. 2), except in the cases mentioned in rr. 3, 6, and 7 of that Order; but in proceedings under the Bills of Exchange Act, an order for leave to proceed as if personal service had been effected will be sufficient, Common Law Procedure Act, 1852, s. 17. Upon serving the copy it is not necessary to show the writ itself, unless the defendant asks to see it at the time of service.
- (3.) *The Record and Writ Clerk's Certificate.*—This certificate, if the

application is under **O. XIII.**, rr. 3, 4, 5, 6, and 7, must be a certificate of no appearance; if under r. 5 (where writ is not specially indorsed) the certificate must also show that the statement of the particulars of the plaintiff's claim to be filed under that rule was filed eight clear days before the day on which the judgment is entered.

The solicitor applying to enter judgment for recovery of possession of part of land under **O. XIII.**, r. 7, must produce the Record and Writ Clerk's certificate of limited appearance, or the notice signed by the defendant or his solicitor, which is referred to in **O. XII.**, r. 21.

R. 5 does not provide for final judgment, nor **r. 6** for interlocutory judgment, being entered in default of the appearance of one of several defendants. In such cases it would seem that the plaintiff should file a statement of claim under **O. XIX.**, r. 6, and in default of pleading proceed under **O. XXIX.**, r. 3 or r. 5, as the case may be.

II. DEFAULT OF PLEADING.—The solicitor applying to enter final judgment in default of pleading under **O. XXIX.**, rr. 2, 3, 7, and 8, or interlocutory judgment, under rr. 4, 5, and 8, must produce the Record and Writ Clerk's certificate of appearance, and the statement of claim, unless it appears by such certificate that the defendant did not require a statement of claim to be delivered. If the statement of claim does not show the date of delivery (which must be eight clear days before judgment is entered), **O. XXII.**, r. 1, the solicitor must indorse such date.

JUDGMENT NOTWITHSTANDING APPEARANCE.—Where under **O. XIV.**, r. 1, plaintiff obtains an order for liberty to sign judgment notwithstanding the appearance of the defendant, such judgment may be signed according to Form 7 in the Schedule hereto, upon production of the order duly passed and entered, and without any other evidence. Such order should be in the following form:—"Upon, &c., and upon reading, &c. it is ordered that the plaintiffs be at liberty, notwithstanding the defendant has appeared, to sign judgment in this action against the defendant for the sum of £ , the amount indorsed on the writ of summons (together with interest), and for their costs to be taxed." N.B.—The costs of this order will be included in the costs to be taxed under the judgment.

IN ANY OF THE ABOVE CASES the solicitor should produce two forms of judgment properly filled up in duplicate according to the forms set forth in the schedule hereto. Where the writ is specially indorsed, interest, if claimed, calculated up to the day of entering judgment, should be added to the amount endorsed on the writ. As no amount has yet been fixed for costs, the judgment at present will be "with costs to be taxed," and the sitting Master will tax the cost with or without notice, as the case may require.

The documents above referred to must be produced to one of the principal clerks at the order of course seat, and be examined by him. If found correct, he will mark both copies of the judgment as examined. He will also see that the proper fee stamp (10s.) is affixed to one of such copies.

In judgment for default of appearance the affidavit of service, if accepted as sufficient, and in judgment for default of pleading, the statement of claim, must be filed by the solicitor in the Record and Writ Clerk's Office, and a note of such filing will be made on the copy judgment to which the fee stamp is so affixed.

The registrar of the day for signing certificates of sale and transfer will then pass the judgment as he would a decree or order by putting his initials to it, and affixing his seal to the duplicate.

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The judgment is to be dated as of the day on which the documents are left at the office, **O. XLI., r. 3**, and will be entered immediately at the entering seat. The duplicate must be left with the clerks of entries for the purpose of entry.

When entered in the Registrar's book it will be marked with the folio of the entry, indexed, and forthwith transmitted by the clerks of entries to the proper seat in the Record and Writ Clerk's Office, to be recorded in the Cause Book kept in that office, and to be filed there.

Copies of the judgments so transmitted will be arranged according to the name of the person against whom the judgment is entered. Such copies can be inspected on payment of the proper fee.

Execution on a final judgment or writ of inquiry on an interlocutory judgment will be issued from the Record and Writ Clerk's Office, on producing the judgment duly passed and entered.

Satisfaction must be entered at the Record and Writ Clerk's Office by filing a satisfaction piece in the form prescribed by the general rules of the Judges dated Hilary Term, 1853, s. 80, with such modifications as may be proper.

SCHEDULE (a).

CHANCERY DIVISION.

Forms of Judgment by Default.

I. Default of Appearance and Defence in Claim for Debt or Liquidated Demand not being under the Bills of Exchange Act.
In the High Court of Justice.

Chancery Division.

M. R. or V.-C.

Mr. , Registrar.

The defendants (or the defendant C. D.) not having appeared to the writ of summons (or not having delivered any statement of defence), it is this day adjudged that the plaintiff recover against the defendants (or the said defendant), £ , and costs to be taxed.

II. Default of Appearance in Action under the Bills of Exchange Act.
In the High Court of Justice.

Chancery Division.

M. R. or V.-C.

Mr. , Registrar.

A. B. having sued out a writ against C. D., indorsed as follows (*Here copy indorsement of plaintiff's claim*), and the said C. D., not having appeared, therefore it is considered that the said A. B. recover against the said C. D, £ , together with £ for costs of suit.

III. Default of Appearance in Action for recovery of Land.
In the High Court of Justice.

Chancery Division.

M. R. or V.-C.

Mr. , Registrar.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

IV. Default of Defence in Action for recovery of Land.
In the High Court of Justice.

Chancery Division.

M. R. or V.-C.

Mr. , Registrar.

(a) See "Court Papers," 20 S. J. 715.

No statement of defence having been delivered herein, it is this day adjudged that the plaintiff recover possession of the land in the writ of summons mentioned, with his costs to be taxed.

RULES OF
COURT.

Ord. 13.

Practice in the
Chancery
Division.

V. Default of Appearance in Claim for Detention of Goods, Damages, Mesne Profits, or Arrears of Rent.

In the High Court of Justice.

Chancery Division.

M. R. or V.-C.

Mr. , Registrar.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff do recover damages to be assessed.

VI. Default of Pleading.

In the High Court of Justice.

Chancery Division.

M. R. or V.-C.

Mr. , Registrar.

No statement of defence having been delivered herein (by the defendant C. D.), it is this day adjudged that the plaintiff do recover (against the defendant, C. D.) damages to be assessed.

VII. Final Judgment after Order obtained by plaintiff for liberty to sign Judgment.

In the High Court of Justice.

Chancery Division.

M. R. or V.-C.

Mr. , Registrar.

The defendant having appeared to the writ of summons herein, and the plaintiff having on the day of obtained an order under O. XIV., r. 1, of the Rules of the Supreme Court, it is this day adjudged that the plaintiff recover against the defendant £ , and costs to be taxed.

VIII. Judgment in Default of Appearance or Defence after Assessment of Damages, &c.

In the High Court of Justice.

Chancery Division.

M. R. or V.-C.

Mr. Registrar.

The defendants not having appeared to the writ of summons herein (or not having delivered a statement of defence), and a writ of inquiry, dated &c., having been issued directed to the Sheriff of , to assess the damages which the plaintiff was entitled to recover, and the said sheriff having by his return, dated, &c., returned (or such damages, &c., having by direction of the judge been ascertained at Chambers, and it appearing by the chief clerk's certificate [or, if any other method has been adopted, state it], that the said damages, &c., have been assessed (or ascertained) at £ , it is this day adjudged that the plaintiff recover £ , and costs to be taxed.

Chancery Registrar's Office, June 23rd, 1876.

1. Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff may apply to the Court or a Judge for an order that some proper

[RULE I.]

Plaintiff may
apply for
guardian ad
litem to defend.

RULES OF
COURT.

Ord. 13.

[RULE I]

defendant who has not appeared. No order made but after due service and notice of application.

person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or Judge at the time of hearing such application shall dispense with such last-mentioned service.

Chancery Consolidated Orders, Order VII., Rule 3.

This rule is almost the same, or at least closely modelled on, the Consolidated Orders in Chancery, O. VII. r. 3, save that that rule was only for the appointment of a solicitor as guardian ad litem: this is for the appointment of any proper person as such. That rule was held to apply to infants residing abroad (a), and to infant married women (b); but where an infant defendant having no substantial interest in the suit was abroad, the Court dispensed with service of notice of the application (c), though it was as peremptorily declared to be requisite by the rule cited as by the present rule.

Rule applied to matters other than suits.

The rule cited applied not only to suits instituted even by the summons in Chambers (d), but also to special cases and to petitions (e), but an affidavit was required of personal service of a petition on an infant respondent (f), and in some cases it was held that infant respondents to petitions need not be served nor appear (g), but in such cases of course no guardian ad litem to them was appointed.

The rule applied not only to infant respondents on a petition, but also by parity of reasoning to lunatic respondents (h).

No guardian ad litem by reason of mere ill health.

A defendant might be ever so incompetent from ill health, if he was not unsound in his mind or an infant, a guardian ad litem could not be appointed (i); and where his competency was in doubt in an old case, an inquiry was ordered (k). In the case of a lunatic found so by inquisition (the rule made no mention of such a case), the committee was of course appointed guardian ad litem (l), but if the committee had an adverse in-

(a) *O'Brien v. Maitland*, 10 W. R. 275; *Anderson v. Stather*, 10 Jur. 383.

(b) See note to *Coleman v. Northcote*, 2 Ha. 148.

(c) *Lambert v. Turner*, 10 W. R. 335; *Turner v. Snowden*, 2 Dr. & S. 265.

(d) *Osbadiston v. Crowther*, 1 Sm. & G. App. xii., 1 W. R. 255.

(e) *Re D. of Cleveland's Hart Estates*, 1 Dr. & Sm. 46; *Re Ward*, 2 Gif. 123; *Re Barrington*, 27 Beav. 272.

(f) *Re Willan*, 9 W. R. 689.

(g) *Re Tweedy*, 9 W. R. 398; *Re Willan*, 9 W. R. 689; *Re Wise*, 5 De G. & Sm. 415.

(h) *Re Greaves*, 2 W. R. 355.

(i) *Willyams v. Hodge*, 1 M'N. & G. 516; but see note (b) *post*, p. 207.

(k) *Lee v. Ryder*, 6 Mad. 294.

(l) *Daniell*, 172.

terest, another guardian would be appointed (*a*). Orders have been made for guardians ad litem to persons of great age unable to give continuous attention to business (*b*).

A lunatic defendant might on his recovery move to discharge the order for his guardian ad litem, but only on condition of his paying his costs in the absence of good grounds to the contrary (*c*). Even where the incompetent defendant had made no default, yet an order was made appointing a guardian ad litem to him upon service on the solicitor by whom he had appeared (*d*), but on the propriety of this there seems to have been some doubt (*e*). The application was by motion, and the order obtained of course (*f*), and where a guardian had not been obtained on the hearing of a petition, the Court made the order as prayed subject to the appointing of a guardian, and directed the order on the petition to be dated after the order appointing a guardian should have been made (*g*). The Court itself nominates the solicitor (*h*), and in general the solicitor to the suitors' fund was nominated where application was made by the plaintiff (*i*), but the rule varied where the application was made by the friends and family of the incompetent defendant, in which any suitable person whom they recommended was appointed (*k*). In the case last cited, the wife's solicitor was, on evidence being given that he had no adverse interest, appointed guardian ad litem to the husband, a lunatic defendant, and in *Leese v. Knight* (*l*), a mother claiming in dower against her children was required to make a special application for appointment as guardian ad litem to them, though she had already been appointed by a common order. So also in another case cited below (*m*), it was said the Court would prefer some adult and competent person having no adverse interest rather than a solicitor or other stranger. But the guardian was required to be resident within the jurisdiction (*n*), and a person himself under disability would not be appointed, nor would the plaintiff in the suit. But a defendant having no conflicting interest might be (*o*): thus, a lunatic's brother co-defendant, having no conflicting interest, was appointed in the case cited (*p*).

Notice served at the house of the mother of the infants, her second husband, their father being proved to be dead, was held good service within the order (*q*). So where infant defendants were concealed in their mother's house to avoid service, it was held that putting a copy of the subpoena under the door of the mother's house was sufficient service (*r*).

RULES OF COURT.

Ord. 13.

[RULE I.]

In case of great age.

Order discharged on lunatic's recovery.

Application by motion of course.

Who appointed.

Service of notice on person under whose care the infant resides.

(*a*) *Worth v. Mackenzie*, 3 M'N. & G. 363.

(*b*) *Newman v. Selfe*, 11 W. R. 764; *Steel v. Cobb*, *ibid.* 298.

(*c*) *Frampton v. Webb*, 11 W. R. 1018.

(*d*) *Bently v. Robinson*, 9 Ha. App. lxxvi., and see *ibid.* xxvi., xxvii.; *Cookson v. Lee*, 15 Sim. 302.

(*e*) See *Saunders v. Walter*, 2 H. & T. 199.

(*f*) *Re Barrington*, 27 Beav. 272.

(*g*) *Re Cooper's Settlement*, 9 W. R. 531.

(*h*) See *Thomas v. Thomas*, 7 Beav. 47; *Biddulph v. Camoys*, 9 Beav. 548; *Sheppard v. Harris*, 15 L. J. Ch. 104.

(*i*) *Ibid.*, *McKeverakin v. Cost*, 7 Beav. 347.

(*k*) *Charlton v. West*, 3 D. F. & J. 156; and see *Moore v. Platel*, 7 Beav. 583; *Biddulph v. Dayrell*, 15 L. J. Ch. 320.

(*l*) 10 W. R. 711.

(*m*) *Anon.*, 9 Ha. App. xxvii.

(*n*) *Anon.*, 18 Jur. 770.

(*o*) *Ibid.* See note (*p*).

(*p*) *Bonfield v. Grant*, 11 W. R. 275; see *Sandford v. Sandford*, 11 W. R. 336; *Gee v. Gee*, 12 W. R. 187.

(*q*) *Hitch v. Wills*, 8 Beav. 576; see too *Baker v. Holmes*, Dick. 18; *Thompson v. Jones*, 8 Ves. 141; *Lane v. Hardwick*, 5 Beav. 222.

(*r*) *Clark v. Waters*, Smith's Ch. Pr., 7th ed., 378.

RULES OF COURT.

Ord. 13.

[RULE I.]

Where guardian died.

In another case service on the rector of the college, of which the infant was an undergraduate member, was held sufficient, the plaintiff being unable to discover where his father resided (*a*). But service on the uncle of an infant was held bad, he not being his guardian (*b*); and where an infant was articulated to and resided with a surgeon, and the affidavit deposed that notice was served upon him while so residing, but did not state that notice was served personally, or at the dwelling house of the surgeon, it was held insufficient (*c*). Where a defendant was of unsound mind and confined in an asylum, the Court would, on proof that on service of the bill on her, she was made aware of the general nature of the claim against her, appoint a guardian to her under this Rule (*d*).

Where a guardian died a special application was needed for the appointment of a fresh one (*e*).

Sunday was reckoned as one of the six days (*f*).

Since the passing of these Acts, in an action by a father against an infant son, who was residing with his mother apart from the plaintiff, an order was made that service of notice of an application to appoint a guardian ad litem to the defendant upon the mother should be sufficient service (*g*).

[RULE II.]

If defendant fail to appear plaintiff proceeding in default must file affidavit of service or notice.

See 15 & 16 Vict. c. 76, s. 27.

Former law.

Judgment to be signed only for sum actually due at time of signing.

Rule only applied to liquidated cases.

2. Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following Rules of this Order, or under Order XV., Rule 1 (*h*), he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be.

This rule much resembles part of the 27th section of the Common Law Procedure Act, 1852, but it includes actions for account, as in O. III., r. 8. By the former law the plaintiff in such case must have filed an affidavit of personal service of the writ or a Judge's order for leave to proceed under the provisions of the Act, and a copy of the writ of summons, and the sum which he might claim for costs as a fixed sum, was fixed as in the section was provided, but he was not limited to that sum, he might claim more, and then the amount was determined by taxation.

Under that law it was held that judgment under that section should only be signed for the sum actually due at the time of signing it. Where the defendant had, since action brought, paid some moneys, and judgment was nevertheless signed for the full amount indorsed, it was ordered to be reduced by the amount paid (*i*). And if the plaintiff, for the purpose of gaining an unfair advantage, claimed interest to which he was not entitled, and signed judgment for it, it was held that the Court would set aside the judgment as irregular, and make the attorney pay the costs (*k*). The rule only applied to cases of liquidated demand, and consequently where damages were claimed for noting and commission on a bill of exchange,

(*a*) *Christie v. Cameron*, 4 W. R. 589.

(*b*) *Blackmore v. Howett*, 30 L. T. 101.

(*c*) *Taylor v. Ansley*, 9 Jur. 1055.

(*d*) *Elliston v. Sheldrake*, 2 L. T. N. S. 48.

(*e*) *Needham v. Smith*, 6 Beav. 130.

(*f*) *Brewster v. Thorpe*, 11 Jur. 6.

(*g*) *Jackson v. Jackson*, 20 S. J. 871.

(*h*) For an account see O. XV., r. 1.

(*i*) *Hodges v. Callaghan*, 2 C. B. N. S. 306.

(*k*) *Rodway v. Lucas*, 10 Ex. 667.

judgment could not be signed under that section (a). The defendant might be let in to defend even after final judgment, upon affidavits satisfactorily accounting for his nonappearance and showing a defence on the merits, but the affidavits must have stated the matter of the defence, and not merely that the defendant had a good defence on the merits (b); though in one case the ordinary affidavit of merits was held to be sufficient under this section, *Martin, B., dissentiente*, and *Pollock, C. B., dubitante*, by *Parke and Platt, BB.* (c). In any case, though it can hardly be doubted that the case of *Whiley v. Whiley*, and the opinion of *Martin, B.*, in *Warrington v. Leake*, is the sounder view of the law as it stood then, the judgments being upon the statutory enactment in the end of sect. 27 above-mentioned, as to what the construction of the words "disclosing a defence on the merits" was; these words do not occur in the new law, where there seems to be nothing limiting the discretion of the Court as to the terms on which it will allow a defendant to come in and defend, against whom a judgment shall be signed under these rules.

In one case, defendants having issued a writ of summons against the plaintiff specially indorsed for £34 under sect. 25 of the Common Law Procedure Act, 1852, signed judgment under sect. 27, in default of appearance, for full amount and costs, and issued ca. sa. indorsed for that amount, under which the plaintiff was arrested, and paid the sum demanded. The plaintiff then applied at Chambers to set aside the judgment on the ground that £16 only was due to the defendants, and the Master set aside the judgment on payment of the costs by the plaintiff. The plaintiff then brought his action against the defendants for false imprisonment. Held, that as the judgment was regular, and as it must be taken that it was set aside as a favour to the plaintiff, not for irregularity or bad faith on the part of the defendants, the action could not be maintained (d).

If it appeared that the defendant had not merits, though he might have a defence, he would even formerly only have been let in on terms. So where judgment had been signed in an action in the Exchequer on a County Court judgment, and it was afterwards decided in the Queen's Bench that such an action would not lie, the Court refused to allow the defendant to come in, except on terms of paying the money into Court or giving bail, he having been arrested (e). Affidavits were not allowed to be used in reply to the defendant's affidavit "disclosing a defence on the merits" (f); and whether, except on the affidavits mentioned in the section, a judgment could in any case be set aside, seems doubtful, except where it was signed on an order to proceed, and that order was set aside (g).

3. In case of non-appearance by the defendant where the writ of summons is specially indorsed, under Order III., Rule 6, the plaintiff may sign final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, but it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may seem just.

(a) *Rogers v. Hunt*, 10 Ex. 474.

(b) *Whiley v. Whiley*, 4 C. B. N. S. 653.

(c) *Warrington v. Leake*, 11 Ex. 304.

(d) *Smith v. Sydney*, L. R. 5 Q. B. 203.

(e) *Austin v. Mills*, 8 Ex. 723; see also *Warrington v. Leake*, 11 Ex. 304.

(f) *Warrington v. Leake*, 11 Ex. 304; 25 L. J. Ex. 27.

(g) See *Hall v. Scotson*, 9 Ex. 238.

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[RULE II.]

Defendant might be let in to defend even after judgment.

Nothing in new law limiting discretion of Court on this head.

Defendant having defence if he had not merits, must have submitted to terms.

[RULE III.]

Where writ is specially indorsed and defendant does not appear, plaintiff may sign judgment for debt, interest, and costs.

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COURT.

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[RULE III.]

15 & 16 Vict.
c. 76, s. 27.18 & 19 Vict.
c. 67 (Bills of
Exchange Act).Dutch law of
provisional
sentence in
liquidated
cases prefer-
able.

This rule taken with the rule last preceding is in lieu of sect. 27 of the Common Law Procedure Act, 1852, which is as follows:—In case of non-appearance by the defendant where the writ of summons is indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a Judge's order for leave to proceed under the provisions of this Act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the Schedule (A) to this Act annexed, marked No. 5 (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs (to be fixed by the Masters of the said Superior Courts, or any three of them, subject to the approval of the Judges thereof, or any eight of them, of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way; and the plaintiff may upon such judgment issue execution at the expiration of eight days from the last day for appearance and not before: Provided always that it shall be lawful for the Court or a Judge, either before or after final judgment, to let in the defendant to defend upon an application supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits.

Stat. 18 & 19 Vict. c. 67, the Act for Summary Procedure on Bills of Exchange and Promissory Notes, kept in force expressly by **O. II., r. 6**, provides a machinery very similar to the provisions of sects. 25 and 27 of the Common Law Procedure Act, 1852, the chief difference being that under the last named Act this machinery is only applicable where the defendant resides within the jurisdiction of the Court, which is not required either under the Bills of Exchange Act or the new Rule; and by the Bills of Exchange Act appearance cannot be entered without leave obtained by the defendant, which cannot in fact be obtained except on the defendant paying into Court the sum indorsed on the writ, or upon affidavits satisfactory to the Judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the Judge may seem fit. Doubts which might be entertained whether the procedure under this Act might not be held to be abolished by the passing of the Act and Orders under review, are set at rest by the **O. II., r. 6**, which provides that the procedure under the Act 18 & 19 Vict. c. 67, shall continue in the cases to which it applies.

As to the last clause in the Rule compare **O. XXIX., r. 14**, *post*, p. 302.

It is not considered necessary in signing judgment in default of appearance to leave with the officer a copy of the writ of summons issued on commencing the action, production of the original writ only, or of a copy of it, being accepted as sufficient. Where, however, the affidavit of service of the writ refers to a copy of it, as "hereunto annexed," the copy must be filed with the affidavit. Notwithstanding this recognised and applied practice, an opinion is entertained by some in favour of a strict compliance with the express provisions of the Bills of Exchange Act, 18 & 19 Vict. c. 67, in all cases where the writ is issued pursuant to that Act; see **O. II., r. 6**, *ante*, p. 163.

In speaking of the Bills of Exchange Act and this Rule, it is worthy of remark that both of them are open to objection in that they almost of necessity must fail of effect in many cases which are completely provided for by a machinery in the Dutch law administered in many of our colonies, and possibly also in other systems of law founded on the Roman law, called process for provisional sentence, which in our Dutch law colonies is applicable to all cases of liquidated demands. The process is that on ser-

vice of the writ being proved, which is done by the return of the writ into Court, indorsed by the officer who has served it (for writs there are served by officers of the Court), and the defendant not appearing and showing good cause against the prayer of the writ, the Court grants what is called provisional sentence, that is, the plaintiff is entitled to levy execution on his executing an instrument giving security that if the defendant shall, within a certain time, *e.g.* a year or six months, bring his action and prosecute it to judgment for the return of the money and costs, the plaintiff will pay the sum recovered thereon. This security in fact is hardly ever put in force, but the obligation to give it has a double effect: it does in some degree prevent a plaintiff suing unfairly, and it allows the Court much more freedom in excluding the defendant from the right of protracting the proceedings by a frivolous defence; while by our English system, as the judgment is final, if the defendant has even a semblance of a case, the Court cannot in fairness allow the plaintiff judgment in the cause by summary procedure.

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[RULE III.]

4. Where there are several defendants to a writ specially indorsed for a debt or liquidated demand in money, under Order III., Rule 6, and one or more of them appear to the writ, and another or others of them do not appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with his action against such as have appeared.

[RULE IV.]

Where some defendants appear and some make default to writ specially indorsed, plaintiff may sign judgment against defaulters and proceed without prejudice to his case against those who appear.

Plaintiff's alternative under former rule.

This Rule corresponds with sect. 33 of the Common Law Procedure Act, 1852, but varies in some respects the course on that section, which required the plaintiff to elect one of two courses. He might issue execution against the non-appearing defendants before he declared against those who had appeared, in which case he was held to have abandoned his action against the latter, or he might, before issuing execution against those who had not appeared, declare against those who had, stating, by way of suggestion, the judgment obtained against those who had not appeared, and in that case the judgment against the non-appears was to be dealt with as a judgment obtained against them by default in an action of debt before the passing of the Act. Under this Rule if the plaintiff did declare against those who had appeared and failed against them, his action against the others would have been useless; he could not tax his costs (*a*) and the judgment would, it would seem, have been arrested (*b*). This it is clear is otherwise now, as he can take execution on the default before going on, and will not be prejudiced by so doing. See also O. XIV., r. 5.

5. Where the defendant fails to appear to the writ of summons and the writ is not specially indorsed, but the plaintiff's claim is for a debt or liquidated demand only, no statement of claim need be delivered, but the plaintiff may file an affidavit of service or notice in lieu of service, as the

[RULE V.]

If defendant fail to appear where claim is liquidated but writ not specially indorsed,

(a) *Morgan v. Edwards*, 6 Taunt. 398.

(b) *Porter v. Harris*, 1 Lev. 63.

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COURT.**Ord 13.**

[RULE.]

no statement of claim required. Plaintiff may file affidavit of service and statement of particulars of demand and enter final judgment.

case may be, and a statement of the particulars of his claim in respect of the causes of action stated in the indorsement upon the writ, and may, after the expiration of eight days, enter final judgment for the amount shown thereby and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ besides costs.

This Rule corresponds with part of s. 28 of the Common Law Procedure Act, 1852, but is not exactly to the same effect, as that section required the plaintiff to file a declaration indorsed with a notice to plead within eight days, while this exempts the plaintiff from pleading at all, but he may file his affidavit of service or the like, and a statement of the particulars of demand. By the former law also, if the costs claimed did not exceed the fixed amount settled by the statute, there need have been no taxation.

Leave had been given to file a declaration under the old practice, giving notice to the defendant, who was abroad. The declaration had not been delivered before Nov. 1st, 1875. Lush, J., had made order that proceedings should be carried on under the Judicature Acts. An application was made to know whether the plaintiff could not now sign judgment under this Rule. He was directed to take out summons (a).

It has been held that this Rule does not apply in case of Admiralty actions *in rem* (b).

[RULE VA.]

Where defendant has option of entering appearance in district registry or in London, when plaintiff may enter judgment for want of appearance.

5A. Where a defendant fails to appear to a writ of summons issued out of a District Registry, and the defendant had the option of entering an appearance either in the District Registry or in the London Office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought, in due course of post, to have reached him.

This Rule was introduced by the Rules of Dec., 1875, in order, as it seems, to meet a difficulty which had occurred under former Rules. **O. XII., r. 15**, provides that if the defendant appears at any time after the time limited for appearance, he shall on the same day give notice thereof to the plaintiff's solicitor. **O. XIII., r. 5**, enables the plaintiff suing for a debt or liquidated demand, on default of appearance, to enter final judgment after eight days. A plaintiff issues his writ in a District Registry; the defendant does not appear there within eight days after service. The plaintiff directs his London agent to search in London, on the opening of the offices, for an appearance. The agent searches at, say 11.5 a.m., and finds no appearance; he telegraphs to the country solicitor at once. The plaintiff signs judgment in the District Registry as soon as he receives the telegram, say 11.45 a.m. In the meantime, the defendant at 11.20 a.m. appears in London, and forthwith gives notice at the London address indorsed on the writ (see **O. IV., r. 1**), such notice being received before judgment could be signed, but too late to stop it. Could this judgment have been set aside, and, if so, what would have been done about the costs or as to damages, if execution had been levied? The answer is noteworthy. Final judgment can only be entered in the District

(a) *Fowler v. Lewy*, W. N. 1875, 232; 20 S. J. 100.

(b) *The Polymede*, 1 P. D. 121; 34 L. T. N. S. 367; 24 W. R. 256.

Registry where the action proceeds in the District Registry (**O. XXXV., r. 1**). Where appearance is entered in London the action is to proceed in London (**O. XII., r. 5**). So that immediately on the entry of appearance the action ceases to proceed in the District Registry, and final judgment entered there is invalid. The Rule above seems to have been intended to obviate difficulties of this kind; but, if so, it seems not altogether effectual for the purpose. The effect of it will be this: the plaintiff now cannot sign judgment till the ninth day, and after the London post shall have arrived on that day. But what if, after the London post is in, he then signs judgment, and before he signs, appearance has been entered in London, and notice duly given? The difficulty remains the same as ever; there is nothing whatsoever to make the judgment so signed good in the latter case more than in the former.

It has been held by reference to this Rule that notice to plaintiff's agent in London is good notice of appearance (*a*).

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[RULE VA.]

6. Where the defendant fails to appear to the writ of summons and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the Court or a Judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried.

[RULE VI.]

On defendant's failure to appear where claim is unliquidated, no statement of claim required, but interlocutory judgment may be entered and a writ of inquiry may issue.

Damages may be otherwise assessed by order.

The procedure under this Rule is altogether new, though something bearing a somewhat similar aspect was provided for by sect. 28 of the Common Law Procedure Act, 1852, which was, however, more general, referring to all actions in which the writ was not specially indorsed, and in which it might not have been so, the last Rule applying instead of that part of the section which referred to cases where, though the writ was not specially indorsed, it might have been so. In either case, under the former law, it was necessary for the plaintiff to file a declaration with an indorsed notice to plead within eight days.

Difference of former procedure.

By reference to this Rule, as judgment might be entered without appearance, *Lush, J.*, allowed to a defendant inspection of ship's papers before appearance in an action on a policy of insurance, as upon the papers depended in part whether he would appear or not (*b*). Though this Rule is the only course specifically pointed out in the Orders for proceeding on in case of default in an action for detention of goods, *Quain, J.*, nevertheless, in an action for detention of specific goods, allowed judgment to be signed for their return, and then recommended advantage to be taken of **O. XLII., r. 4 (c)**. In *Scott v. The Royal Wax Candle Company*, the plaintiff having served notice out of the jurisdiction in the old unamended form given in Appendix A, Part I., No. 3, stating that plaintiff might *by leave of the*

(*a*) *Johnson v. Whitehead*, W. N. 1876, 10; 20 S. J. 217.

(*b*) *Anon.*, 20 S. J. 81.

(*c*) *Ivory v. Cruickshank*, W. N. 1875, 249; 20 S. J. 140.

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[RULE VI.]

[RULE VII.]

In action for recovery of land if no appearance or appearance limited to part, judgment for plaintiff as to undefended part.

Semble service must be proved.

Court or a Judge proceed, &c., and then proceeded to obtain a judgment under this Rule, such judgment was subsequently set aside on the ground that the notice so given was misleading (a), but see on this matter note on O. II. r. 3a, ante, p. 157.

7. In case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.

It is presumed that in all these cases, before any step can be taken on default of appearance, he must prove service; indeed, Rule 2 seems intended to provide for any omission of special directions in that behalf in any of the Rules themselves.

In a case where the defendant, the collector of rents of certain leaseholds, had absconded and could not be found, and the tenants of the houses refused to pay their rents, the Court directed substituted service of the writ of summons to recover possession of the houses to be effected by leaving a copy of the writ at each of the houses, and by inserting advertisements in the *London Gazette* and the *Times*. In such a case, if no special directions be given as to time, the ordinary eight days only will be allowed from the time of serving the copies of the writ or issuing the advertisements, whichever was latest (b).

[RULE VIII.]

Where in such action claim indorsed for mesne profits, &c., plaintiff may enter judgment, &c.

8. Where the plaintiff has endorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, he may enter judgment as in the last preceding Rule mentioned for the land; and may proceed as in the other preceding Rules of this Order as to such other claim so indorsed.

[RULE IX.]

In Chancery and Probate causes on failure to appear, plaintiff may file affidavit of service, and proceed as if defendant had appeared.

9. In actions assigned by the 34th section of the Act to the Chancery Division, and in Probate actions, and in all other actions not by the Rules in this Order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service the action may proceed as if such party had appeared.

Hitherto the rule in Chancery was the 10th Consolidated Order, Rules 4, 6, and 7, subs. 4, in all which provision was made for entry of an appearance for a defendant in default for not appearing. Rule 4 provided for a defendant within the jurisdiction, duly served, not being incompetent;

(a) 1 Q. B. D. 404; 45 L. J. Q. B. D. 586; 34 L. T. N. S. 683; 24 W. R. 668.

(b) *Crane v. Jullion*, 2 Ch. D. 220, form of order given, 24 W. R. 691, ante (p. 187).

Rule 6, for an absconding defendant who seemed to have avoided service of the bill; and Rule 7, subs. 4, for a defendant out of the jurisdiction served by order of the Court. By the new Rule it seems entry of an appearance for the defendant is unnecessary, the filing of an affidavit of service seems sufficient; but where such an affidavit cannot be filed, as in the case dealt with in Rule 6, mentioned above, it is submitted that the course provided by that Rule must still be followed; and it would seem that, in the case met by Rule 7, an affidavit of service of the bill or writ will not suffice without also mentioning service of the order of the Court, allowing abnormal service as provided in **O. IX. r. 2.** This, however, may be what is meant by "a proper affidavit of service," *i.e.*, an affidavit of service of a nature proper to each case.

With reference to this Rule, it is most material to compare **O. XXIX. r. 10**, and the cases cited on that Rule, *post*, p. 298.

In a foreclosure suit commenced before Nov. 2, 1875, against two defendants, both in New Zealand, the property in question being in this country, each of the defendants had, under an order made in Jan., 1875, been served with copy of the bill and interrogatories and copy order, and after the expiration of the time limited neither had appeared, motion was made for leave to file traversing note without entering appearance for the defendants, and thereupon to deliver reply joining issue, and any other document requiring to be delivered under **O. XIX. r. 6**; for leave to serve on defendants in New Zealand copy of traversing note when filed, and notice of joinder of issue, together with order and also notice of trial, and for leave after service of such notice to set down cause for trial, but not until the expiration of six months after service on the last served defendant. If no appearance should be entered for the defendants before trial for leave to proceed under the decree without further service on or notice to the defendants, the defendants to be at liberty to move to vary or discharge the order (**O. LIII. r. 3**). All this was granted (*a*), but the order was subsequently, on the authority of *Dymond v. Croft* (*b*), after mentioned (*c*), amended as follows. The Court doth order that this cause be prosecuted and carried on under the provisions of the Judicature Acts, 1873 and 1875, and for that purpose that the plaintiff's bill be treated as the plaintiff's statement of claim, and that the defendants be deemed to have made default in putting in their statement of defence within the meaning of **O. XXIX. r. 10**. Leave to the plaintiffs to serve notice of motion for judgment abroad and copy of order now made was omitted (*d*). In another case a bill was filed in June, 1875, and duly served on the defendants, some of whom appeared. Interrogatories were afterwards served on all the defendants. One defendant entered no appearance and put in no answer. A motion was made for directions how to continue the suit. The Master of the Rolls took the distinction between this suit and one of *Culley v. Buttifant*, which was a case where defendant was in default for want of pleading, while here the default was of appearance. He ordered the suit to go on under the new practice, the plaintiff to proceed as if the defendant had appeared (under this Rule), and then the defendant to deliver defence, and if not delivered in time the plaintiff to set down on motion for judgment, under **O. XXIX. r. 10**, on affidavit of default of defence. The bill to be taken as statement of claim (*e*). In *Menton v. Metcalf* (*f*), the effect of

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[RULE IX.]

Former rule in
Chancery.

Cases on this
Rule.

(*a*) *Gardiner v. Hardy*, W. N. 1876, 153.

(*b*) 3 Ch. D. 512; 45 L. J. Ch. D. 612; 35 L. T. N. S. 27; 24 W. R. 700.

(*c*) See *post*, p. 260, **O. XIX., r. 6**.

(*d*) *Gardiner v. Hardy*, W. N. 1876, 185.

(*e*) *The Provident Permanent Building Society v. Greenhill*, 1 Ch. D. 624; 45 L. J. Ch. D. 272; 20 S. J. 271.

(*f*) 36 L. T. N. S. 683; W. N. 1877, 142; 21 S. J. 609, *sub nom. Minton v. Metcalf*, 46 L. J. Ch. D. 584.

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[RULE IX.]
—

this Rule, in conjunction with O. XIX. r. 2, was discussed. It was an action for foreclosure, and the defendant had not appeared: the plaintiff proceeded on affidavit of service under this Rule, and then, without delivering a statement of claim, delivered, under O. XIX. r. 6, a notice of motion for judgment, on which, in default of defence, under O. XXIX. r. 10, judgment was obtained. The Registrar objected to draw up the order for want of statement of claim, under O. XIX. r. 2, and application was made to Hall, V.-C., to order it to be drawn up or to extend the time for delivering statement of claim. He held that the defendant could not be taken by non-appearance to have waived statement of claim, and as none had been filed, defendant was not in default in pleading. He directed that the order be not then drawn up, but gave the plaintiff a fortnight within which to deliver statement of claim.

[RULE X.]
—

In Admiralty
actions in rem
where default
of appearance.

10. *Annulled by Rules of the Supreme Court, December, 1875.*

The whole of this Rule is annulled by the Rules of Dec., 1875, r. 8, and it has been held that since its annulment the Order does not apply to Admiralty actions *in rem*, and that the annulment of O. XIII. r. 10 revives the Admiralty Rules in force before the Acts of 1873 and 1875, viz., the 4th and 5th Rules of Admiralty Court additional Rules, 1871 (a).

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ORDER XIV.

LEAVE TO DEFEND WHERE WRIT SPECIALLY INDORSED.

[RULE I.]
—

1. *By Rules of the Supreme Court, May, 1877, this Rule was repealed and the following substituted:*

Order XIV., Rule 1, of the Rules of the Supreme Court, is hereby repealed and the following Rule is substituted:—

On appearance
to writ spe-
cially indorsed,
plaintiff may
call on defen-
dant to show
cause why he
should not sign
final judgment
for demand
with interest
and costs.

1. Where the defendant appears on a writ of summons specially indorsed, under Order III., Rule 6 (b), the plaintiff may, on affidavit, made by himself or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make

(a) *The Polymede*, 1 P. D. 121; 34 L. T. N. S. 367; 24 W. R. 256; see also *The Sfacteria*, 2 P. D. 3; 35 L. T. N. S. 431; 25 W. R. 62; see also Act of 1875, s. 18, *ante*, p. 119.

(b) With particulars of liquidated demand.

an order empowering the plaintiff to sign judgment accordingly (a).

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Ord. 14.

[RULE I.]

The procedure under this Rule is new, and seems to have been very much used, and to be a great saving of expense in all cases which are really undefended. It is to be remarked that in terms it is only applicable in cases originating under O. III., r. 6, and in consequence, it would seem, never could be used where the declaration had been filed under the old system; on this matter, however, the practice varied considerably, see cases below (b), and eventually to have allowed the signing of judgment in cases where the indorsement, though not under O. III., r. 6, was similar to what it should have been under that Rule, though it cannot be said to have been securely settled on that basis; but the point is one which by lapse of time seems to be now very unlikely to arise again in the specific form noticed. The words "unless the defendant by affidavit or otherwise satisfy the Court or a Judge, &c." have received note from Quain, J., who explained them thus: "On hearing these applications, I do not pretend to try the action; all that I require is, to see that there is a *bonâ fide* defence" (c). So, in a case where the affidavits on each side were actually contradictory, the Judge refused to allow the plaintiff to sign judgment (d), and where the affidavits showed a case depending on the fact of whether a deed were delivered as an escrow or not, which was not clear on the affidavits, leave to sign judgment was also refused (e). It has, indeed, in terms been held that this Rule applies only to cases which on defendant's own admission are really undefended, but does not apply to those where a defendant has a right to require the plaintiff to prove his case (f), and it has further been held, that where a defendant shows what the grounds of his defence are, and shows substantial grounds for thinking that it is a good defence, he ought not even to be compelled to pay money into Court as a condition to his being let in to defend (g): but a mere affidavit that the defendant has a good defence, without showing its nature, is not sufficient to prevent judgment being signed under this Rule, and if not clearly supported in some way, judgment will be ordered to be signed (h). In one case it was held, that affidavits filed by the defendant were a mere attempt to deceive the Court, and showed no defence really, and in such case they were ineffectual to prevent signing judgment (i), and wherever they show anything but a good defence on the merits, they will not be sufficient *per se* to prevent the signing of judgment, though they may afford a reason why on security given, or the like conditions, the signing of judgment should be stayed: thus, where an action was brought against a firm of solicitors for money due, the defendants had been ordered to collect debts due to the plaintiffs, and had not paid them over, they had a claim against the plaintiffs admitted of £70, and had a balance in their

Affidavits by
defendant must
show a good
defence on
merits.

(a) The words "made by himself," &c., and the clause requiring copy of the affidavit to accompany the summons or notice, were introduced by the new Rule in consequence of the cases below cited, *Bank of Montreal v. Cameron*, and *Frederici v. Vanderzee*, *post*, p. 219.

(b) *Anon.*, W. N. 1875, 230; 1876, 12; 20 S. J. 101, 162, 219; *Denison v. Franklyn*, 20 S. J. 198; *Fowler v. Lee*, W. N. 1876, 86; 20 S. J. 320.

(c) *Andrew v. Stewart*, W. N. 1876, 7; 20 S. J. 162. See note on next rule.

(d) *Anon.*, 20 S. J. 299; see also *Ameuny v. H. H. the Nawab Nazim of Bengal*, W. N. 1875, 239; 20 S. J. 120.

(e) *Berridge v. Roberts*, W. N. 1876, 86; 20 S. J. 320.

(f) *Lloyd's Banking Co. v. Ogle*, 1 Ex. D. 262; 45 L. J. Ex. D. 606; 34 L. T. N. S. 584; 24 W. R. 678; see also *Anon.*, 20 S. J. 919.

(g) *Runnacles v. Mesquita*, 1 Q. B. D. 416; 45 L. J. Q. B. D. 407; 24 W. R. 553.

(h) *Anon.*, W. N. 1875, 249; 20 S. J. 141.

(i) *Anon.*, 20 S. J. 162.

RULES OF
COURT.**Ord. 14.**

[RULE I.]

No answer to application made under this rule that regular process will do fuller justice.

But if it be shown that defendant may have a good defence on the merits that will be sufficient.

hands of £131; an application for leave to sign judgment against them for this sum, under this Rule, was opposed by one defendant charging collusion between his colleague and the plaintiffs, and offering to pay his share of the debt if the plaintiff would undertake that execution should not be levied against him for the residue; the application was allowed without conditions (a). So an objection raised to signing judgment under this Rule, the cause of action being a stockbroker's account, on the ground that the defendant had taken proceedings in bankruptcy, and disputed the correctness of the account, was overruled (b). So, in an action for hire of a steam pump and labour in putting it up, on an appeal from the order of the Master directing judgment to be signed unless the amount of the claim were paid into Court, Archibald, J., is reported to have said: To a certain extent on these applications the question of liability must be tried, but how far one is to try it is a nice question, the Rule must not be rendered inoperative, and he dismissed the appeal with costs (c). So in an action for money paid at the request of the defendant for differences on the Stock Exchange, the Master had refused to make order to sign judgment, on the ground that there was an arrangement between the parties to carry over the account, Archibald, J., said: How can an arrangement between the parties to carry over the account be an answer to this action? It is mere matter of arrangement, a promise to postpone, for which the defendant cannot suggest any consideration, and he gave order to sign judgment (d). So, also, where a defendant in appeal from the Master, who had ordered the signing of final judgment, stated in an affidavit that the guarantee which was the cause of action was given in respect of an undelivered bill of costs under protest and under pressure, and that the promise was without consideration, Denman, J., said: That the defendant ought not to have given the guarantee is no defence to the action. Consideration appears on the face of the guarantee, viz., the giving up of a lease. It would be cruelty to the defendant to allow this action to go on, and he confirmed the order (e). A merely formal difference between the indorsement of the writ and the form of the indorsement given under O. III., r. 6, in Appendix A., Part II., sect. 7, such as misplacing a date, is no answer to an application to sign judgment under this Rule (f). Nor is the fact, that by the regular process of the Court fuller justice might be administered all round. Thus an objection by defendants, acceptors of a bill, to a proceeding to sign judgment under this Rule, that the drawer was being sued in Russia on the bill, and if the acceptors might defend, they could include him as a party against whom they were entitled to an indemnity, was overruled, and they were ordered to pay the money into Court, or in default judgment might be signed (g). A like order was made where a defence was attempted to be set up by way of counterclaim on an agreement to pay costs as to which there had been as yet no order (h). But an objection showing that it was impossible to say whether the defendant might not have a good defence was allowed. Thus, where service out of the jurisdiction in New York had been made on Jan. 5th, on a subsequent application heard on Jan. 13, it was held a sufficient reason for refusing to allow judgment to be signed or ordering payment of money into Court, that the defendant had not had time to communicate with his solicitors his instructions with reference to the summons taken

(a) *East Assam Co. v. Roche and Gover*, W. N. 1875, 238; 20 S. J. 100.

(b) *Anon.*, W. N. 1876, 23; 20 S. J. 242.

(c) *Phillips v. Harris*, W. N. 1876, 54; 20 S. J. 280.

(d) *Woolston v. Baines*, W. N. 1876, 74; 20 S. J. 299, 320.

(e) *Anon.*, W. N. 1876, 106; 20 S. J. 342.

(f) *Anon.*, W. N. 1876, 53; 20 S. J. 282.

(g) *German Bank of London v. Schmidt*, W. N. 1876, 10; 20 S. J. 217.

(h) *Roberts v. Guest*, W. N. 1876, 10; 20 S. J. 217.

out on Jan. 7 (*a*). But it was held that the affidavit in every case under this Rule in its old form must be the affidavit of the plaintiff himself, an affidavit by his solicitor would not suffice (*b*), and where the plaintiff was a corporation, an affidavit by its secretary was held insufficient (*c*), on which account the rule was amended, and these cases will be no longer of importance. A proceeding under this Rule seems only adapted to a purely personal demand, and where an action was brought on a guarantee given by a married woman in respect of her separate estate; the writ had been indorsed under **O. III., r. 6**, for a sum of money due on a guarantee signed by the female defendant. No reference was made in the indorsement to the wife's separate estate. The plaintiff now sought to sign judgment under this Rule. Quain, J., said: I doubt whether **O. III., r. 6**, refers to anything but to a merely monetary demand, and here you seek to charge the defendant's separate estate. I will give you leave to amend the indorsement on your writ, but I question whether that will allow you to avail yourself of this Rule (*d*). In *French v. Lear* (*e*), the matters in dispute had been referred to an arbitrator, and the writ purported to be specially indorsed under **O. III., r. 6**, for the amount due to the plaintiffs on his award with interest. By the terms of the award the plaintiffs, who were a firm of solicitors, were to pay all the costs of the reference and the amount of the defendant's costs was to be deducted from the amount awarded. The defendant had not specified the amount of these costs, and contended that this was therefore not a liquidated demand which could be specially indorsed under **O. III., r. 6**. The plaintiffs applied to sign judgment for the amount of the award, subject to the deduction of such costs of reference as should be found due to the defendant on taxation. The Court held that this could not be done, that they were not entitled to sign final judgment until the amount of the costs had been ascertained, and the writ indorsed with a claim for a specific sum.

It seems that "No Order" on an application under this Rule for leave to sign judgment is equivalent to leave to defend, no time for delivery of statement of defence being named, and the case falls then within **O. XXII., r. 3 (f)**.

We understand that Lopes, J., has announced that applications under this Rule will hereafter be considered as urgent business, and such as may be made during the Vacation (*g*).

RULES OF
COURT.

Ord. 14.

[RULE I.]

2. The application by the plaintiff for leave to enter final judgment under the last preceding Rule shall be made by summons returnable not less than two clear days after service.

[RULE II.]

Such application to be by summons.

All the procedure under **O. XIV.** is new, and seems to be convenient and effectual for the purpose intended. By the machinery of this Order the course is varied considerably from what is the most analogous procedure in the law as it has hitherto existed, *i.e.*, procedure under the Bills of Exchange Act, 1855. The course under that Act required an application after service by the defendant for leave to enter an appearance and

Difference between procedure under this order and under Bills of Exchange Act, 1855.

(*a*) *Anon.*, W. N. 1876, 23; 20 S. J. 242.

(*b*) *Frederici v. Vanderzee*, 2 C. P. D. 70; 46 L. J. C. P. D. 194; 35 L. T. N. S. 844, 889; 25 W. R. 389.

(*c*) *Bank of Montreal v. Cameron*, 2 Q. B. D. 536; 46 L. J. (App.) Q. B. D. 425; 36 L. T. N. S. 415; 25 W. R. 593.

(*d*) *Butterworth v. Tee and Wife*, W. N. 1876, 9; 20 S. J. 178.

(*e*) 21 S. J. 479.

(*f*) *Margate Pier and Harbour Co. v. Perry*, W. N. 1876, 52; 20 S. J. 279; *Atkins v. Taylor*, W. N. 1876, 11; 20 S. J. 218.

(*g*) 21 S. J. 829.

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Ord. 14.

[RULE II.]

Similarities probable between the two procedures.

Further remarks on bill of exchange procedure.

[RULE III.]

Course for defendant seeking to defend.

defend. The new procedure gives the defendant the right to enter an appearance, and puts the application on the plaintiff for leave to enter judgment after appearance, but it is presumed the grounds on which this application might be refused would be very like those on which the defendant's application for leave to defend under the other practice would be granted, save that in some cases the defendant had, under the Act of 1855, an absolute right to defend, which is not allowed by this procedure; thus, on paying into Court the sum indorsed on the writ, the defendant, without any affidavit, might defend if he chose, but without this the merest semblance of a defence, not absolutely frivolous, was enough to gain him the right to defend (a), and this is still, as may be seen, in a great degree the rule; nor is it needful that the defence should be stated as particularly as in a plea (b), and though the statements in the defendant's affidavits were denied by the plaintiff, leave was yet and is still under this procedure given (c), for the Judge would not and will not try the action on affidavits, though if on the defendant's own affidavits they were palpably untrue, there the leave to defend might be refused (d). The application by the defendant under that Act was *ex parte* in the first instance (e). An appeal lay to the Court from the order of the Judge either allowing or refusing leave; but, except in a strong case, the Court did not interfere (f), but if fraudulently obtained the order would be set aside either by the Court or the Judge who made it (g). The defendant was not on the trial confined to the defence set up by his affidavit (h), and this Rule will no doubt be applied to the new Order.

3. The defendant may show cause against such application by offering to bring into Court the sum indorsed on the writ, or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the Judge may, if he think fit, order the defendant to attend and be examined upon oath; or to produce any books or documents or copies of or extracts therefrom.

A reference to the cases cited under r. 1 will show the nature of the affidavits required under this Rule.

When a defendant has made an affidavit under this Rule, leave may be given to the plaintiff to file an affidavit in reply (i).

[RULE IV.]

Plaintiff may have judgment for part while defence allowed to the residue.

4. If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim; or that any part of his claim is admitted to be due; the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject

(a) *Mathews v. Marsland*, 27 L. J. Ex. 148.

(b) *Clay v. Turley*, 27 L. J. Ex. 2. See *Andrew v. Stewart*, ante, p. 217, and note on last foregoing rule.

(c) *Febert v. Stevens*, 30 L. J. Ex. 1.

(d) S. C.

(e) *Fitch v. Glover*, 26 L. T. 59.

(f) *Pollock v. Turnock*, 1 H. & N. 741.

(g) *Ibid.*

(h) See *Saul v. Jones*, 1 E. & E. 59.

(i) *Davis v. Spence*, 1 C. P. D. 719; 25 W. R. 229.

to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

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COURT.

Ord. 14.

[RULE IV.]

In the case of *Lord Hanmer v. Flight* (a), the plaintiff was allowed on appeal from the Master to sign judgment for £157 10s. arrears of rent accrued during the time while possession by defendant was admitted, as well as the costs of the original motion and appeal, but this was afterwards reversed (b). In another case, the Master had ordered £100 to be paid into Court, being practically admitted by the defendant as due, but had refused to order judgment to be signed for any part of the claim. On appeal it was ordered that the plaintiff should be at liberty to sign judgment for £100, unless that sum were paid within a week (c).

5. If it appears to the Judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

[RULE V.]

One defendant may be permitted to defend while judgment allowed against another.

See also O. XIII., r. 4.

6. Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the Court or a Judge may think fit.

[RULE VI.]

Leave to defend may be allowed on conditions.

A reference to the cases cited under r. 1 will show in what nature of cases conditions are annexed to the leave to defend; see *Ex parte Horsford, in re Smith* (d).

ORDER XV.

Ord. 15.

APPLICATION FOR ACCOUNT WHERE WRIT INDORSED UNDER ORDER III., RULE 8.

1. In default of appearance to a summons indorsed under Order III., Rule 8 (e), and after appearance, unless the

[RULE I.]

In default of appearance to summons, &c.

(a) W. N. 1876, 54; 20 S. J. 280; on appeal from Judge's order, 35 L. T. N. S. 127; 24 W. R. 346.

(b) 36 L. T. N. S. 279.

(c) *Anon.*, W. N. 1876, 53; 20 S. J. 282.

(d) W. N. 1877, 189; 37 L. T. N. S. 44; 25 W. R. 799; 21 S. J. 731.

(e) With claim for account see O. III., r. 8.

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COURT.

Ord. 15.

[RULE I.]

defendant, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made.

It may be recollected that O. III., r. 8, provides for indorsement of claim for common account on writ of summons.

In the case of *Bell v. Lowe* (a), an action in a common law division was stayed on an order being obtained from the Chief Clerk in the Chancery Division on administration proceedings under this Rule. In *Pike v. Keene and Byne* (b), an order under this Rule that defendant should within ten days file a sworn account of monies received by him on the sale of certain goods entrusted to him for sale not having been complied with, an application was made to attach him under O. XXXI., r. 20, which see; but it was held that that Rule did not apply to this order, and the application in consequence failed. See also on this point O. XVI., r. 10. An application being made on notice of motion that an order under this Rule should be made without appearance having been entered by defendant, the Master of the Rolls held that no order could be made under this Order unless defendant had either appeared or made default, even if application could, having regard to r. 2, be made by motion (c).

It was held in *Irlam v. Irlam* (d), that only on default of appearance could a District Registrar make an order under this Rule.

[RULE II.]

Application by
summons after
time for
appearance
expired.

2. An application for such order as mentioned in the last preceding Rule shall be made by summons, and be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired.

It is evident that under this Order many decrees which could formerly have only been made on hearing in Court, may now be obtained by Order in Chambers if the claim for account has been indorsed on the writ. The practice first introduced in Administration suits only by 15 & 16 Vict. c. 86, § 45, and O. XXXV., r. 3 of Consolidated Orders in Chancery, has thus in fact been practically extended to all suits for ordinary account within O. III., r. 8, *ante*, p. 172.

Ord. 16.

ORDER XVI.

PARTIES.

[RULE I.]

Persons may
be joined as
plaintiffs, &c.

1. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given

(a) W. N. 1875, 229; 20 S. J. 97.

(b) W. N. 1876, 36; 35 L. T. N. S. 341; 24 W. R. 322.

(c) *Re Plant, deceased, Hazall v. Hodgson*, 20 S. J. 663.

(d) 2 Ch. D. 608; 24 W. R. 292.

for such one or more of the plaintiffs as may be found to be entitled to relief, or such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct.

RULES OF
COURT.

Ord. 16.

[RULE I.]

This Rule is in detail carried out by the subsequent r. 13 (see notes on that Rule). R. 1 of this Order seems nearly identical with the Common Law Procedure Act, 1860, sect. 19; but that section gave no assistance where the right lay alternatively in one or other of two or more plaintiffs. This has now been amended. Upon the construction of this Rule the case of *Cox v. Barker* is worthy of attention. A testator, W. S. Cox, had entered into negotiations with W. Barker for sale to him of two freehold houses, in which by settlement executed upon the marriage of the testator a life interest had been limited in trust for Mrs. Cox to her separate use, in default of joint appointment by herself and her husband. The state of the title was disclosed to the purchaser, and it was stated in the conditions of sale that the vendor "will procure an assignment of the premises to the purchaser to be executed by all necessary parties." Before the sale was completed, W. S. Cox died, having made a will, by which he appointed Mrs. Cox and others executors and devisees in trust. Mrs. Cox, after his death, being advised she was not bound to concur in the conveyance in respect of her life estate in the property under her marriage settlement, had commenced an action and delivered statement of claim, by which the determination by the Court was asked of various questions as between herself and Barker, and also as between herself and the real and personal representatives of her husband. Barker demurred on the ground in effect that a merely declaratory decree was sought, and that in the greater part of the questions asked he was not interested, and that Mrs. Cox had not stated whether she would adopt or repudiate the contract for sale. The Vice-Chancellor overruled the demurrer, saying it was the clear intention of the Legislature that in such a case all persons interested and every question that could arise should be brought before the Court and disposed of once for all; that relief merely declaratory might be given; that Barker's title as well as his defence was among the questions raised, and the demurrer must be overruled, but without costs. On appeal the decision was affirmed (a). An action for libel may be brought by several persons jointly, though not in partnership or otherwise jointly interested (b). A promissory note was made to one Hart, a banker, who, going abroad, put it into the hands of the Mercantile River Plate Bank, but without indorsing it to them. On its falling due, he being informed that he had not indorsed it, sent them an indorsed copy of it. They having sued on the note, it was sought to substitute Hart as plaintiff, and the order was on application made (c). Where two parties sued together as joint lessees of a railway, it was held that separate counterclaims, one against each of the co-plaintiffs, might be well pleaded in the action (d). But, notwithstanding this general rule, no one can now, no more than formerly, make

See Common
Law Procedure
Act, 1860,
sect. 19.

Cox v. Barker.

(a) 3 Ch. D. 359.

(b) *Booth v. Briscoe*, 2 Q. B. D. 496; 25 W. R. 838.

(c) *Mercantile River Plate Bank v. Isaac*, W. N. 1876, 104; 20 S. J. 340.

(d) *Manchester, Sheffield and Lincolnshire Railway Co. and London & N. W. Railway Co. v. Brooks*, 2 Ex. D. 243; 46 L. J. Ex. D. 244; 36 L. T. N. S. 103; 25 W. R. 413.

RULES OF
COURT.Ord. 16.
[RULE II.]

Court may substitute or add plaintiff for or to plaintiff suing.

alternative claims for relief which are inconsistent one with the other, and where a claim was made in one alternative by a defendant against a person not a party to the original claim, in which he had no interest one way or other, a demurrer by the third party was allowed (a).

2. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a Judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just.

Caution necessary as to exercise of the power.

It is obvious that this Rule must be very cautiously dealt with in practice; and the power as to terms is quite necessary, since the adding of a new plaintiff may make a new person liable for costs, which he has never undertaken himself, and the circumstances can rarely occur in which such a step ought to be taken; however, it is not to be assumed that the power will be used where it ought not. See with reference to this Rule, r. 13, *post*, pp. 223—243.

The following cases have been decided with reference to this Rule. On an *ex parte* application to amend a writ of summons in an action by adding a new plaintiff, the Master of the Rolls referred to this Order, O. XXVII., r. 11, passed in the Rules of the Supreme Court, February, 1876, allowing amendment on terms, and gave leave *ex parte* for the amendment, without prejudice to any application on the part of the defendants to expunge the amendment (b). On an *ex parte* motion to strike out the plaintiff and substitute three infant cestuis que trusts as plaintiffs instead of him and to make him defendant, he being a trustee, the Vice-Chancellor ordered the joinder of the three cestuis que trusts by their next friend as plaintiffs, and if this should give rise to a misjoinder, he would at the hearing order the plaintiff trustee to be treated as a defendant. He said he could not alter parties to an action on an *ex parte* application (the case just before mentioned does not seem to have been cited to him), but the plaintiff might give the defendants notice that an order had been made in these terms, and require them to state whether they objected to the order or required notice. If they did not object, the order would be drawn up as made upon motion, while, if they required service, the Court on further application would deal with the costs, which would otherwise be costs in the cause (c).

In addition, see *Smith v. Haseltine* (d). This Rule applies to errors in law as well as fact (e). A plaintiff can only be added under this Rule where there has been a *bonâ fide* mistake (f). Where a party is added to

(a) *Evans v. Buck*, 4 Ch. D. 432; 46 L. J. Ch. D. 157; 25 W. R. 392; see also *Child v. Stenning*, *post*, p. 225; 5 Ch. D. 695; 46 L. J. Ch. D. 523; 36 L. T. N. S. 426; 25 W. R. 519; but see *Ede v. Vyse*, *post*, p. 226; 21 S. J. 498, 788.

(b) *Webster v. Thorne*, 20 S. J. 351.

(c) *Tildesley v. Harper*, 3 Ch. D. 277.

(d) *Post*, p. 241; W. R. 1875, 250; 20 S. J. 140.

(e) *Duckett v. Gover*, 46 L. J. Ch. D. 407; W. N. 1877, 62; 25 W. R. 455.

(f) *Clowes v. Hilliard*, 4 Ch. D. 413.

the record, a motion to erase his name is only allowed to be made by his authority (a).

RULES OF
COURT.

Ord. 16.

[RULE III.]

3. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Persons may be joined as defendants, liable jointly, severally, or alternatively.

By the Common Law Procedure Act, 1852, sect. 37, full powers of amendment were given to the Court in cases where defendants were misjoined, but this new Rule allows justice to be done without any amendment.

See 15 & 16
Vict. c. 76,
s. 37.

The cases just noticed of *Cox v. Barker* (b) and *Evans v. Buck* (c) are authorities under this Rule also and worthy of consideration in connection with it. Under this Rule, see also *Honduras Inter-Oceanic Railway Company v. Lefevre and Tucker* (d); *Child v. Stenning* (e); *Manchester, Sheffield, and Lincolnshire Railway Company, &c. v. Brooks*, just cited (f); *Hornwell v. London General Omnibus Company* (g). A trustee appointed to distribute composition among creditors of the acceptors of a bill ought not to be joined as a party to an action by the indorsee against the acceptors (h).

4. It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest.

[RULE IV.]

Each defendant need not be interested in entire relief.

In the case of *Child v. Stenning*, the statement of claim set forth an agreement between one Wagner and the plaintiff, S. Child, by which Wagner agreed to demise to Child for ninety-nine years, from 25th Dec., 1873, a piece of land at Brighton, with right of way, with or without horses, carts, and carriages, over a piece of land connecting the piece leased with the Caledonian Road. Plaintiff erected a skating rink and stable on the land leased, and a lease was executed according to the agreement. Defendants, J. and A. Stenning, builders, occupied premises on the east side of plaintiff's land, and before May, 1875, they made communications between their premises and plaintiff's land, and claimed the right of carrying timber, &c., from their premises over that land to the Caledonian Road. The plaintiff, in consequence of the obstructions caused by the defendants' proceedings, commenced his action, and claimed damages, injunction, and costs. Defendants filed defence and counter-

Child v.
Stenning.

(a) *Duckett v. Gover*, W. N. 1877, 80.

(b) 3 Ch. D. 359.

(c) *Evans v. Buck*, 4 Ch. D. 432; 46 L. J. Ch. D. 157; 25 W. R. 392.

(d) 2 Ex. D. 301; 46 L. J. (App.) Ex. D. 391; 36 L. T. N. S. 46; 25 W. R. 310, *post*, p. 228.

(e) 5 Ch. D. 695; 46 L. J. Ch. D. 523; 36 L. T. N. S. 426; 25 W. R. 519.

(f) 2 Ex. D. 243; 46 L. J. Ex. D. 244; 36 L. T. N. S. 103; 25 W. R. 413.

(g) 2 Ex. D. 365; 36 L. T. N. S. 637; 25 W. R. 610, *post*, p. 247.

(h) *Campbell v. Im Thurn & ors.*, W. N. 1875, 199.

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COURT.

Ord. 16.

[RULE IV.]

*Child v.
Stenning.*

claim, making Wagner co-defendant with Child, and stated that, by an agreement dated 26th Dec., 1865, Wagner demised to D. & D. the premises which they, the defendants, occupied for ninety-nine years with option of purchase, that in May, 1867, Wagner conveyed the fee to D. & D. Defendants were at first yearly tenants, and on the 4th August, 1876, became grantees in fee of D. & D. They alleged that they were entitled to a right of way as against Wagner, and all persons claiming under him, from their premises over the land, damages for the obstruction of their right of way, an injunction against Child from further obstruction, and costs. Afterwards Child filed amended statement of claim against the Stennings, and made Wagner a co-defendant. He denied that the Stennings had any right to do as they had done, and if he should be held entitled to the right of way, he claimed damages from the Stennings for the wrongs complained of; an injunction against them from trespassing on any part of the land demised to him, and any repetition of the acts complained of; but if the Court should be of opinion that the Stennings were entitled to a right of way as against Wagner and persons claiming through or under him from their premises over the land described, then that Wagner might be ordered to pay to the plaintiff damages for the injury occasioned to him by the existence and exercise of such right, and the breach of covenant for quiet enjoyment in the lease, and such further damages, if any, as he might in such case be ordered to pay to the Stennings, and costs. The Stennings filed an amended defence and counterclaim, and after stating their title and the interruption to their alleged rights, they claimed a declaration as stated in their counterclaim; and that they might be quieted in the possession of such their right, and that Wagner might indemnify them against such damages and costs, if any, as they might be ordered to pay to Child; damages for the obstruction of their right of way as against Child; and damages against Wagner, if the Court should be of opinion that Child was entitled to the injunction asked by him, and an injunction against Child from further obstructing the right of way and costs. Wagner demurred to both amended counterclaim and amended statement of claim to the latter; because it did not show any present cause of action against him, and because it sought alternative and inconsistent relief against the defendants thereto (see *Evans v. Buck (a)*), and to the former, because no facts were alleged by way of counterclaim, showing or supporting a cause of action or counterclaim against him, and because it sought alternative and inconsistent relief against the defendants thereto.

On argument, s. 24 of Act of 1873, O. XVI., r. 3, O. XVII., r. 1, and O. XIX., r. 10, were cited. The Vice-Chancellor allowed both demurrers (b). The Court of Appeal, however, thought that the case was one to which the Rule, O. XVI., r. 3, exactly applied, and overruled the demurrer. If the plaintiff was right, he must succeed against one or other defendant; if he had to bring separate actions against them, he might fail in both; this was the mischief the Rule was meant to guard against, and both the defendants ought to be parties to the same action. If it should turn out that the two causes of action could not conveniently be tried together, then O. XVII., r. 1, gave the Court power to order them to be tried separately (c). In *Ede v. Vyse*, Vice-Chancellor Hall held that the Rule against inconsistent alternative relief only amounted to this, that a plaintiff could not put forward two distinct states of fact, and then claim antagonistic relief; but in the case then before him all the relief claimed was on the same state of facts, and the Rule did not consequently apply (d).

(a) 4 Ch. D. 432; 46 L. J. Ch. D. 157; 25 W. R. 392, *ante*, pp. 223-224.

(b) *Child v. Stenning*, W. N. 1877, 66.

(c) 5 Ch. D. 695; 46 L. J. Ch. D. 523; 36 L. T. N. S. 426; 25 W. R. 519

(d) 21 S. J. 498.

Where in an administration suit the title of the plaintiff as a beneficiary was doubtful, and the trustee of the will was the sole defendant, the Court, on the application of the trustee, ordered that the person interested in disputing the plaintiff's title should be made defendant (*a*). See also on this Rule *Manchester, Sheffield, and Lincolnshire Railway Company, &c. v. Brooks* (*b*).

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COURT.

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[RULE IV.]

5. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.

[RULE V.]

Plaintiff may
join parties
liable on same
contract.

By Order 7 of the Consolidated Orders in Chancery, Rule 2, it was provided that where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable. This Rule was held to be applicable where the amount is ascertained, see (*c*); but at first sight seems to have been disregarded in cases referred to (*d*). These cases, however, seem to be well decided, the distinction having been consistently established that the order permits a suit to go on against some defendants severally liable, when the extent of their liability is fixed in any case; but where a general account and general administration are sought, or may be involved in the suit, all the parties who may be involved in the account must be before the Court (*e*), and the order will not be held to apply. It is apprehended that the like limitation will apply in the case of the new order, for the same reason prevails now as under the former order. The personal representative of an executor or trustee, who had never acted or received assets, was not, even before the passing of the old Rule (which was a renewal of Rule 32, of 26th August, 1841), a necessary party to a suit for the administration of the estate (*f*). But the general order did not allow a partnership debt to be recovered against one partner's representative without making a surviving partner a party (*g*); for the surviving partner was the partner legally liable to pay the debt. A plaintiff was not allowed under this order to sue a surety in the absence of his principal or co-surety (*h*); see also as to parties in respect of joint and several demands (*i*).

Suit may pro-
ceed against
several defend-
ants where
extent of their
liability is
fixed, &c.

Partnership
debt.

(*a*) *Day v. Ratcliffe*, 24 W. R. 844.

(*b*) 2 Ex. D. 243; 46 L. J. Ex. D. 244; 36 L. T. N. S. 103; 25 W. R. 413.

(*c*) *Perry v. Knott*, 5 Beav. 293; *Strong v. Strong*, 18 Beav. 408; *Norris v. Wright*, 14 Beav. 291; *Att.-Gen. v. Pearson*, 2 Coll. 581; *Att.-Gen. v. Corp. of Leicester*, 7 Beav. 176; *Bateman v. Margerison*, 6 Ha. 496; *Masters v. Barnes*, 2 Y. & C. C. C. 616.

(*d*) *Fussell v. Elwin*, 7 Ha. 29; *Lewin v. Allen*, 8 W. R. 603; *Fowler v. Reynal*, 2 De G. & Sm. 749; *Shipton v. Rawlins*, 4 Ha. 619; see note to *Devaynex v. Robinson*, 24 Beav. 86, and see *Macgachen v. Dew*, 15 Beav. 84.

(*e*) *Coppard v. Allen*, 2 De G. J. & S. 173; *Chancellor v. Morecraft*, 11 Beav. 262; *Biggs v. Penn*, 4 Ha. 469; *Hall v. Austen*, 2 Col. 570; *Penny v. Penny*, 9 Ha. 39.

(*f*) *Brown v. Pittman*, Gilb. Eq. R. 75; *Strickland v. Strickland*, 12 Sim. 463; *Dyson v. Morris*, 1 Ha. 413; *Pitt v. Brewster*, Dick. 37; and compare *Masters v. Barnes*, 2 Y. & C. C. C. 616, with *Hall v. Austen*, 2 Coll. 570, and *Holland v. Prior*, 1 M. & K. 237.

(*g*) *Hills v. M'Rae*, 9 Ha. 297; *Cox v. Stephens*, 2 N. R. 506.

(*h*) *Lloyd v. Smith*, 13 Sim. 457; *Pierson v. Barclay*, 2 De G. & Sm. 746; *Allan v. Houlden*, 6 Beav. 148.

(*i*) *MacIntyre v. Connell*, 1 Sim. N. S. 252; *Mayor of Berwick v. Murray*, 5 W. R. 208; *Colby v. Hawkins*, 6 Jur. 162.

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COURT.**Ord. 16.**

[RULE V.]

Rule in equity
seems un-
changed; liens
at law.

It is submitted that all the exceptions which prevailed against the old Rule, in the like circumstance, prevail against the new; but the practice in Common Law matters is considerably altered, as many defendants may now be sued together who would formerly have required separate actions against them.

This Rule introduces powers which seem quite new, and appears calculated to encourage suits against persons who are not in the least liable to any claim, and merely for the purpose of getting the opinion of the Court whether any demand may be made against them or not (*a*), a matter of which a plaintiff hitherto was required to certify himself, by recourse to his own advisers without proceeding against any one until he had at least an opinion of counsel that that one was liable.

[RULE VI.]

Plaintiff in
doubt against
what person
he is entitled
to remedy may
join those as to
whom he
doubts.

6. Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as herein-after mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action.

This Rule also creates a new remedy. It seems intended to give a plaintiff power to join several parties in an action when it may be quite clear that he has rights against but one of them, and he is not sure which: in such case it has been decided that the plaintiff must bear the costs of any defendant against whom no case has been established (*b*). But it seems hardly just to allow that defendant to have been harassed by a suit on the mere ground that the plaintiff thought he might have some ground of suit against him, and it is not clear that even the plaintiff will have any great advantage from the new practice.

It has however been decided that the new practice allows no more than the old, alternative claims for inconsistent relief (*c*). A contract was entered into by T. in the name of L. to take certain debentures in a limited company, and an action was brought by the company against L.; the plaintiffs afterwards obtained leave to amend their writ by adding the name of T. as a defendant, L. denying that he had given T. authority to enter into the alleged contract. T. then obtained a rule to enter judgment for him in the action under O. XL., r. 11, on the ground that it appeared from the statement of claim that he could not be liable as well as L., and that it was there alleged that he had in fact had the authority from L. which he had professed. The Exchequer Division having discharged this rule, T. appealed. Held that the plaintiffs were entitled to claim alternative relief against one or other of the defendants, and that this Rule gave them power to join the defendant T. in the action (*d*). See on this Rule also case before cited of

(*a*) See *Cox v. Barker*, 3 Ch. D. 359.

(*b*) *Marsh v. Dunlop*, 21 S. J. 75.

(*c*) *Evans v. Buck*, 4 Ch. D. 432; 46 L. J. Ch. D. 157; 25 W. R. 392; see also *Child v. Stenning*, 5 Ch. D. 695; 46 L. J. Ch. D. 523; 36 L. T. N. S. 426; 25 W. R. 519; but see *Ede v. Vyse*, ante, p. 226; 21 S. J. 498.

(*d*) *Honduras Inter-Oceanic Railway Co. v. Lefevre and Tucker*, 2 Ex. D. 301; 46 L. J. (App.) Ex. D. 391; 36 L. T. N. S. 46; 25 W. R. 310.

Manchester, Sheffield, and Lincolnshire Railway Co., and London and North-Western Railway Co. v. Brooks (a).

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[RULE VII.]

Trustees, &c., may represent trust estate without parties beneficially interested. Court may order new parties.

7. Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a Judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto.

This Rule may often save costs, but it is of course open to the objection that great mischief may occasionally be effected if trustees, &c., do not act with sufficient care and skill; on the whole, however, the Rule seems a good one.

8. Married women and infants may respectively sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of this Act; and infants may, in like manner, defend any action by their guardians appointed for that purpose. Married women may also, by the leave of the Court or a Judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require.

[RULE VIII.]

Married women and infants may sue and be sued as in Chancery. Or married women may sue or defend alone on giving security.

This introduces in Common Law matters a practice which was found most useful in Chancery. It also adds, both in Chancery and Common Law matters, a power which cannot fail to be useful.

Except, however, by leave of the Court, a wife still cannot be sued without joining her husband in the action (b).

9. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

[RULE IX.]

One party may sue or defend on behalf of all in same interest.

This will be a useful power sometimes even in Common Law matters. Something like it in administration was indispensable, and has always existed in Chancery in the case of creditors' suits for administration and the like; but this was one plaintiff suing on behalf of himself and all others. The process of defending by one or more on behalf of others

Similar practice did exist to some extent in Chancery.

(a) *Ante*, p. 223; 2 Ex. D. 243; 46 L. J. Ex. D. 244; 36 L. T. N. S. 103; 25 W. R. 413.

(b) *Ochse v. Redfern*, 20 S. J. 560.

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[RULE IX.]

was also allowed where the defendants were so numerous that they could not all be made parties (a).

With reference to this rule, see the cases noted on O. III., r. 3, *ante*, viz., *Cooper v. Blisset* (b); *Worraker v. Pryor* (c); *Fryer v. Wiseman* (d); *Adcock v. Peters* (e); *Fryer v. Royle* (f). Notwithstanding the order in *Worraker v. Pryor*, the writ need not in the case of a creditor's administration proceeding be intituled as of the creditor suing on behalf of himself and all other creditors; it suffices that the indorsement shows it and the statement of claim, but the writ must be intituled in the matter of the estate, &c., as is given in the forms in Appendix C. (g). An action was brought under this rule by one on behalf of himself and other underwriters. An application was made to stay the action on the ground of an agreement to refer the dispute, to which the actual plaintiff in the action was a party; the other plaintiffs were willing to join in the reference if the defendants would admit themselves owners, which however they refused to do. It was held that if they refused to admit their ownership, there was a question for the jury and the agreement did not apply, and in consequence there was no order unless the defendants should admit ownership; if they did so admit, order to stay with liberty to settle terms of reference, costs to be costs in the cause (h). An action was brought by one of jointowners of ship against charterers; the defendants applied to have the other joint owners added as plaintiffs under r. 13, the application was refused on the ground that it was an attempt to reintroduce the mischief of pleas in abatement (i).

The following additional Rule has been here introduced by the Rules of the Supreme Court, June, 1876 :—

[RULE IXA.]

Power of Court in certain cases to appoint person to represent heir-at-law, next-of-kin, or class, where such are not known, &c.

9A. In any case in which the right of an heir-at-law or the next-of-kin or a class shall depend upon the construction which the Court may put upon an instrument, and it shall not be known or be difficult to ascertain who is or are such heir-at-law or next-of-kin or class, and the Court shall consider that in order to save expense or for some other reason it will be convenient to have the question or questions of construction determined before such heir-at-law, next-of-kin, or class, shall have been ascertained by means of inquiry or otherwise, the Court may appoint some one or more person or persons to represent such heir-at-law, next-of-kin, or class, and the judgment of the Court in the presence of such

(a) *Richardson v. Larpent*, 2 Y. & C. C. C. 507; *Pare v. Clegg*, 29 Beav. 589-602; *Bromley v. Williams*, 32 Beav. 177; *Hoole v. G. W. Railway Co.*, L. R. 3 Ch. 262-273; *Cramer v. Bird*, L. R. 6 Eq. 143-148; *Pickering v. Williams*, 15 W. R. 218.

(b) *Ante*, p. 169, 1 Ch. D. 691; 24 W. R. 235.

(c) *Ante*, p. 169, 2 Ch. D. 109; 45 L. J. Ch. D. 273; 24 W. R. 269.

(d) 20 S. J. 292.

(e) *Ante*, p. 170, W. N. 1876, 139; 20 S. J. 451.

(f) *Ante*, p. 170, 5 Ch. D. 540; 36 L. T. N. S. 441; 25 W. R. 528.

(g) *Eyre v. Cox*, 24 W. R. 317; 20 S. J. 311.

(h) *Leathley, on behalf of himself, &c., v. McAndrew and another*, W. N. 1876, 38; 20 S. J. 259. See note to O. IV., r. 1, *ante*, p. 173.

(i) *De Hart v. Stevenson*, 1 Q. B. D. 313; 45 L. J. Q. B. D. 575; 24 W. R. 367.

person or persons shall be binding upon the party or parties or class so represented.

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[RULE IXA.]

Administration
of an estate.

Under this Rule, the following case has been determined. A testator made bequest to his wife for life, and after her death "to be divided equally among my heirs and to their children, with Henry Richard Powell to be share and share alike." Questions arose whether "heirs" meant heir-at-law or next of kin, whether the gift to children imported a gift by limitation, or was a gift over to the children of such heir as died before the period of distribution; in which case there would be two classes of children, *i.e.*, children who survived their parent and died before the period of distribution, and children who survived their parent and were alive at the period of distribution. The testator had had two brothers; neither had been heard of for more than forty years; it was believed that one had had children, but none could be found. All the testator's next of kin were believed to be dead. The tenant for life died in March, 1876, and the action was brought for administration by an administrator *de bonis non* with the will annexed, and also a son of one of the testator's next of kin who had died in the lifetime of tenant for life; the defendants were children of another next of kin, who had also died in the lifetime of tenant for life. On motion for judgment, the Vice-Chancellor ordered the following inquiries under this Rule for the appointment of some person or persons to represent the following parties and classes—(1) the heir-at-law; (2), the next of kin at the death; (3), the children of the heir-at-law who survived their parent, and were alive at period of distribution; (4), the children of the heir-at-law who survived their parent but died before period of distribution; (5 and 6), similar inquiries to those contained in 3 and 4 respectively, as to children of next of kin. Also an inquiry as to the death of Henry Richard Powell, and that under s. 44 of the Chancery Procedure Act some one might be appointed to represent him, and that the chief clerk might be directed to certify in respect of the matters aforesaid without waiting to make his certificate in respect of the inquiries afterwards directed. Then inquiries as to debts and other ordinary inquiries in administration decree, reserving further considerations until certificate as to first-mentioned inquiries and appointments. The Vice-Chancellor made the order (*a*).

10. Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct.

[RULE X.]

Co-partners
may sue and
defend in name
of their firms.
Party may
apply by sum-
mons for names
of those so
appearing.

This Rule seems to be partly aided and partly rendered unnecessary by O. VII., r. 2, which see.

The following cases have been decided with reference to it. An action had been commenced in a District Registry on which judgment was

(*a*) *In re Peppitt's Estate, Chester v. Phillips*, 4 Ch. D. 230; 46 L. J. Ch. D. 95; 35 L. T. N. S. 902; 25 W. R. 211.

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COURT.

Ord. 16.

[RULE X.]

entered in London under **O. XXXV.**, r. 2, which see; an application was made for the names of the persons who were co-partners in the defendant's firm; an objection that this application should have been made before District Registrar was overruled (*a*). It has been held that no rule justifies an application for the names of parties interested where the action is by one on behalf of himself and all others in the like relation (*b*). Where on an application under this Rule a party had been ordered to give the information and had neglected to do so, an attempt made to attach him under **O. XXXI.**, r. 21, was unsuccessful, as that Rule was held not to apply to such a case (*c*).

The following Rule has been here introduced by Rules of the Supreme Court, June, 1876 :—

[RULE XA.]

A person carrying on business in name of firm how sued.

10A. Any person carrying on business in the name of a firm apparently consisting of more than one person, may be sued in the name of such firm.

[RULE XI.]

15 & 16 Vict.
c. 86, s. 42,
kept in force
as to parties.

11. Subject to the provisions of the Act, and these Rules, the provisions as to parties contained in section 42 of 15 & 16 Victoria, chapter 86, shall be in force as to actions in the High Court of Justice.

The Rules as to parties in Chancery seem in other respects than those in which any alteration may have been expressly made by the Rules already mentioned, and the other Rules of this Order, to be left as they were hitherto, and that this is the intention seems indicated by repassing this Rule as to parties. The Rules mentioned are as follows :—

1. Any residuary legatee or next of kin may, without serving the remaining residuary legatee or next of kin, have a decree for the administration of the personal estate of a deceased person.

2. Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.

3. Any residuary devisee or heir may, without serving any co-residuary devisee or coheir, have the like decree.

4. Any one of several cestuis que trust under any deed or instrument may, without serving any other of such cestuis que trust, have a decree for the execution of the trusts of the deed or instrument (*d*).

5. In all suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

(a) *Lynch v. Oversall Coal Co.*, 20 S. J. 160.

(b) *Charles Leathley on behalf of himself and others, &c. v. Robert McAndrew & Co.*, W. N. 1875, 259; 20 S. J. 160; see also **O. IV.**, r. 1, *ante*, p. 173; *De Hart v. Stevenson*, 1 Q. B. D. 313; 45 L. J. Q. B. D. 575; 24 W. R. 367, *post*, p. 242.

(c) *Pike v. Frank Keene and Byne*, W. N. 1876, 36; 35 L. T. N. S. 341; 24 W. R. 322; *ante*, p. 222.

(d) *McLeod v. Annesley*, 16 Beav. 607, 22 L. J. Ch. 637.

6. Any executor, administrator, or trustee, may obtain a decree against any one legatee, next of kin, or cestui que trust for the administration of the estate, or the execution of the trusts.

7. In all the above cases the Court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

8. In all the above cases the persons who, according to the present practice of the Courts, would be necessary parties to the suit, shall be served with notice of the decree, and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit; and they may, by an order of Court, have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed, apply to the Court to add to the decree (a).

9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the person beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts, parties to the suit; but the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties (b).

12. Subject as last aforesaid, in all Probate actions the rules as to parties, heretofore in use in the Court of Probate, shall continue to be in force.

Under this Rule in *Kennaway v. Kennaway* (c), on an application made to cite certain devisees under a will propounded by the executor in an altered form to see proceedings, it was held that the following r. 13 was an addition to and not inconsistent with the former practice of the Probate Court, and leave to cite was given, referring to 20 & 21 Vict. c. 77, s. 61.

13. No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined, be struck out; and

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[RULE XI.]

[RULE XII.]

Probate rules
maintained as
to parties.

[RULE XIII.]

Action not to
fail by reason
of misjoinder.
Court may
dismiss or add
parties.

(a) See on this rule *De Balinhard v. Bullock*, 9 Ha. App. xiii.; *Doody v. Higgins*, 9 Ha. App. xxxii.

(b) See on this rule the following cases, *Goldsmith v. Stonehewer*, 9 Ha. App. xxxviii.; *Harman v. Riley*, 9 Ha. App. xl.; *Sale v. Kitson*, 3 De G. M. & G. 119, 22 L. J. Ch. 344; *Cropper v. Mellersh*, 24 L. J. Ch. 430.

(c) 1 P. D. 148; 45 L. J. P. D. A. 86; 34 L. T. N. S. 854; 24 W. R. 586.

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COURT.

Ord. 16.

[RULE XIII.]

No one to be added as plaintiff or sui juris nor as next friend of plaintiff without his consent. Defendants added to be served.

Former law in Chancery.

At Common Law.
23 & 24 Vict.
c. 26, s. 19.

Limit of enactment.

15 & 16 Vict.
c. 76, ss. 34,
35.

Misjoinder of defendants in actions *ex contractu*.

that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto. All parties whose names are so added as defendants shall be served with a summons or notice in manner herein-after mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.

Formerly, misjoinder of plaintiffs in Chancery was ground for demurrer or plea (a) as the case might be, and consequently for dismissal of the bill, but this has long been remedied (b). At law, also, a misjoinder of plaintiffs in actions *ex contractu* might have been fatal before the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126, s. 19), by which it was enacted that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the Court to be entitled to recover: Provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the Court or a Judge. This enactment, however, only applies where the plaintiffs named include all the true plaintiffs, not where one of the plaintiffs together with another person not plaintiff were the persons really entitled (c), and it has been held not to apply where one only of the plaintiffs was entitled and the question really was which of them (d); either of these cases might it seems be dealt with under the new rule.

There had been some steps taken even before the Act of 1860 before named to remedy the mischiefs of misjoinder and nonjoinder at Common Law; thus by the Common Law Procedure Act, 1852, ss. 34 and 35, provisions had been made which it is not now necessary to set out specifically.

The misjoinder of plaintiffs in actions *ex delicto* was before the Act of 1860 fatal, but this has been amended by the same section as is above referred to, with regard to actions *ex contractu*.

The joinder of too many defendants in actions *ex contractu* was also fatal formerly at law, for the contract had to be proved as a contract between all the plaintiffs and all the defendants, and if a different contract

(a) *Cuff v. Platell*, 4 Russ. 242; *King of Spain v. Machado* 4 Russ. 225; *Makepeace v. Haythorne*, 4 Russ. 244; *Page v. Townshend*, 5 Sim. 395; *Delondre v. Shaw*, 2 Sim. 237; *Glyn v. Soares*, 3 M. & K. 450-472.

(b) 15 & 16 Vict. c. 86, s. 49; *Clements v. Bowes*, 1 Drew. 684; *Evans v. Coventry*, 3 Drew. 75; 5 De G. M. & G. 911; *Beeching v. Lloyd*, 3 Drew. 227; *Williams v. Salmand*, 2 K. & J. 463; *Stupart v. Arrowsmith*, 3 Sm. & G. 176; *Barton v. Barton*, 3 K. & J. 512.

(c) *Stubs v. Stubs*, 1 H. & C. 257; 31 L. J. Ex. 510.

(d) *Bellingham v. Clark*, 1 B. & S. 332.

was proved it did not sustain the action, so if all the defendants but one in an action *ex contractu* against them all suffer judgment by default and one pleads in denial of the contract, the plaintiff had to prove a contract by all, or the entire action failed (*a*). But the Common Law Procedure Act, 1852, s. 37, gave full powers to the Court to amend in all such cases before or at trial, where it should seem to it not to do injustice, on such terms as it should think fit.

The misjoinder of defendants on a true action *ex delicto* was harmless as regards the action; one defendant might be acquitted and the other convicted (*b*); the defendants acquitted were entitled to their costs unless the Judge certified against them, that there was reasonable ground for joining them (*c*). As to the rule for ascertaining what costs are allowed in such cases, see cases (*d*). Where two defendants really appeared by one attorney, though apparently by two, they were not allowed separate bills of cost (*e*), and where two defended by two members of the same firm only, one set of briefs, counsel's fees, &c., was allowed (*f*).

In equity there was no such thing as misjoinder of defendants, that is to say it has no effect on the suit; the bill may well be allowed against some defendants and dismissed against others.

But a nonjoinder of requisite parties in equity is still ground for an objection which may be taken if apparent on the face of the bill by demurrer (*g*), or may be taken by plea (*h*) or answer or at the hearing (*i*), even though not taken by demurrer when it was open; but, if apparent on the face of the bill, a demurrer was certainly the most proper way of raising the objection. Section 42 of 15 & 16 Vict. c. 86 abolished the objection for want of parties in many cases comprised in the 9 Rules laid down in that section which are cited above in note to Rule 11, *ante*, pp. 232—233.

S. 43 of same Act abolished the practice, before that used, of setting down a cause on an objection for want of parties. And even before these enactments, a demurrer for want of parties, even when allowed, did not in general put the cause out of Court; for the plaintiff nearly always had leave to amend by adding the proper parties (*k*); but it was not imperative to grant this leave, for if the Court saw that the plaintiff would have no relief even after amendment by the addition of parties, it was not bound to let the cause stand over for the addition of parties (*l*); the suit was however not so out of Court as to prevent the Court after the demurrer was allowed, granting an injunction or receiver (*m*).

Where the bill shows a good reason why some proper parties had not been made parties to the suit, as, for instance, that they are residing out

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[RULE XIII.]

Misjoinder of defendants in actions *ex delicto*.

Costs.

No misjoinder of defendants in equity.

Setting down cause on objection for want of parties abolished. Effect of demurrer for want of parties.

Disallowed where bill showed grounds for omission.

(*a*) *Eliot v. Morgan*, 7 C. & P. 334.

(*b*) *Cooper v. South*, 4 Taunt. 802; *Rich v. Pilkington*, Carth. 171; *Bastard v. Hancock*, Carth. 361.

(*c*) 8 & 9 W. 3, c. 11, s. 1; 3 & 4 W. 4, c. 42, s. 32.

(*d*) *Griffiths v. Kynaston*, 2 Tyr. 757; *Griffith v. Jones*, 4 D. P. C. 159, 2 C. M. & R. 333; *Starling v. Cousins*, 1 Gale, 159; *Gambrell v. Earl of Falmouth*, 5 Ad. & E. 403; *Norman v. Climenson*, 4 Man. & G. 243; *Alderson v. Waistell*, 2 D. & L. 127; *Bartholomew v. Stephens*, 5 M. & W. 386.

(*e*) *Nanny v. Kenrick*, 2 D. P. C. 334.

(*f*) *Gambrell v. Earl Falmouth*, 5 Ad. & E. 403.

(*g*) *Hamp v. Robinson*, 3 De G. J. & S. 97-109.

(*h*) *Hamm v. Stevens*, 1 Vern. 110, Mitford on Pl. 280.

(*i*) *Cox v. Stephens*, 9 Jur. N. S. 1144; 11 W. R. 929.

(*k*) *Bressenden v. Decrees*, 2 Ca. in Ch. 197; see also *Lloyd v. Loaring*, 6 Ves. 773-779.

(*l*) *Tyler v. Bell*, 2 M. & C. 89-110; 1 C. P. Coop. t. Cott. 39; *Lund v. Blanchard*, 4 Ha. 9-23; *Lister v. Meadowcroft*, 1 C. P. Coop. t. Cott. 372.

(*m*) *Hamp v. Robinson*, 3 De G. J. & S. 97-109; see *Const. v. Harris*, T. & R. 514.

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[RULE XIII.]

Costs on such
objection.Consolidated
orders, Order
23, Rule 11.Only used
where rights
of absent
party might be
saved by
decree.Either party
may now apply
for new parties.Leave might
have been
for new co-
plaintiffs.In Chancery
no objection
for want of
plaintiff, if
party before
Court.

of the jurisdiction (*a*), or where it seeks a discovery of the necessary parties (*b*), neither a demurrer nor a plea for want of parties would be allowed, unless the plea showed that the excuse made by the bill was untrue (*c*).

Where the objection was taken by the defendant in his answer or affidavit, or was on the face of the bill, the objection being raised at the hearing gave the defendant the costs of the day, and the plaintiff had liberty to amend or file supplemental bill; but if the objection depended on a fact in the defendant's knowledge and he has not raised it on his answer or affidavit, the plaintiff had his leave to amend without paying the costs of the day (*d*). No costs were given where the defect arose from a matter occurring after the cause was at issue (*e*).

Objections for want of parties are however now rare, as, in addition to the other enactments discouraging and preventing them which have been already alluded to, the General Order 23, Rule 11, provided that—Where a defendant at the hearing of a cause objects that a suit is defective for want of parties and has not, by plea or answer, taken the objection and therein specified by name or description the parties to whom the objection applies, the Court, if it shall think fit, may make a decree saving the rights of absent parties: see on this Rule (*f*). This discretion the Court would only use where the rights of the absent party might be saved by the decree: so, where the husband of a female plaintiff or defendant was absent, the Court would not make a decree in his absence (*g*); nor in the absence of a party who had assigned his property in trust for creditors (*h*); nor would it give leave at the hearing to add parties if by so doing the nature of the case made by the bill were changed (*i*). It is presumed that the exercise of the Court's discretion will, as to cases of nonjoinder, be limited by the same reasons as formerly, though the rule as to misjoinder is imperative.

A plaintiff had formerly no right on bringing on the cause imperfect for want of parties to postpone it on that ground if the defendant did not take the objection (*k*), though cases of exception might occur; but by this new Rule provision is made that either upon or without the application of *either* party the Court may add parties.

On leave being granted to add parties, a plaintiff was not obliged to add them as defendants; he might apply for leave to make them co-plaintiffs, and has been allowed to do so, after the defendants had answered the original bill (*l*). The addition of a co-plaintiff after answer, however, is not of course, but lies in the discretion of the Court.

It is to be observed, however, that in Chancery there is no objection for want of a plaintiff if the party whose absence as plaintiff is complained

(*a*) *Cowslad v. Cely*, Pr. Ch. 83; *Darwent v. Walton*, 2 Atk. 510.

(*b*) *Bowyer v. Covert*, 1 Vern. 95.

(*c*) Mitford Pl. 281.

(*d*) *Mitchell v. Bailey*, 3 Mad. 61; *Furze v. Shorwood*, 5 M. & C. 96; *Att.-Gen. v. Hill*, 3 M. & C. 247; *Mason v. Franklin*, 1 Y. & C. C. C. 239-242; *Kirwan v. Daniel*, 7 Ha. 347-351; *Moodie v. Bannister*, 17 Jur. 520.

(*e*) *Fussell v. Elwin*, 7 Ha. 29.

(*f*) *Meddowcroft v. Campbell*, 13 Beav. 184; *Maybery v. Brooking*, 7 De G. M. & G. 673; *Faulkner v. Daniel*, 3 Ha. 199; *May v. Selby*, 1 Y. & C. C. C. 235; *Feltham v. Clark*, 1 De G. & Sm. 307; *Daubuz v. Peel*, 1 Coop. t. Cott. 365.

(*g*) *Russell v. Lucy*, 18 L. J. Ch. 464.

(*h*) *Kimber v. Ensworth*, 1 Ha. 293-295.

(*i*) *Deniston v. Little*, 2 Sch. & Lef. 11 n.; *Watts v. Hyde*, 2 Ph. 406-411; *Bellamy v. Sabine*, 2 Ph. 425-427.

(*k*) *Innes v. Jackson*, 16 Ves. 356-361.

(*l*) *Hichens v. Congreve*, 1 Sim. 500; see *Maughan v. Blake*, 3 L. R. Ch. 32.

of be a defendant; the only objection is for want of parties. In this we shall see the Courts are at variance.

At Common Law in actions *ex contractu* the absence of a co-plaintiff was ground for objection, if it appeared on the face of the declaration without excuse by demurrer, motion in arrest of judgment, or error; for the declaration was as upon a contract made with the plaintiffs by the defendant; whereas it appears that it was not a contract with the plaintiffs alone, but with the plaintiffs and some one else, which is a variance; but if the contract is well set out and grounds are alleged in the declaration for the plaintiffs alone suing, which grounds the defendant desires to dispute, he could plead in abatement, or he must, since the Common Law Procedure Act, 1852 (*a*), give the plaintiff notice in writing at or before the time of pleading that he objected to the nonjoinder, specifying in the notice the names of the parties who ought to be joined. If he omitted to do this, the Court, under that section, had power to amend at the hearing, unless it appeared that the error was made by the plaintiff to gain an unfair advantage, or that injustice would be done by the amendment, and if it should appear that the party to be joined as co-plaintiff consented to be so joined. The Court could also before the trial, by s. 34 of the same Act, amend by ordering plaintiffs to be joined, if the amendment should not appear to do injustice, and if the parties to be joined should consent.

If a plea in abatement were pleaded, or the notice of objection above-mentioned were served, the plaintiff might thereupon amend without asking leave, on filing a consent in writing of the party whose name was joined, and an affidavit verifying the handwriting, unless the filing of the consent were waived by the order of the Judge (*b*).

The new Order, it will be seen, alters the machinery of procedure somewhat, but does not effect on the whole much change.

In actions *ex delicto*, truly of that character, no objection could be taken to the nonjoinder of a plaintiff apparent on the face of the record by way of demurrer, motion in arrest of judgment, or error, and it was only open on a plea in abatement (*c*), and in that case was liable to all the statutory enactments hereinbefore stated or referred to; but if the action, though in form *ex delicto*, was really *ex contractu*, it followed the rules of actions *ex contractu* (*d*). The case below cited was one of nonjoinder of defendants; but the principle applies equally to the case of nonjoinder of plaintiffs (*e*).

In actions again *ex contractu* the nonjoinder of a co-defendant was ground only for a plea in abatement (*f*), no demurrer could be generally pleaded even though the error was patent on the pleadings (*g*); for if the action was on a contract made by the defendant and others with the plaintiff, it would rarely appear on the declaration that the co-contractor was alive and within the jurisdiction, both which facts must appear in order to substantiate the objection, which, therefore, necessitated a plea in abatement to raise it; and if the action were on a specialty it must also be shown that the omitted parties executed the instrument, for if they did not it could not be valid as a joint instrument even of those who did, though if intended as joint and several it will be the several instruments

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[RULE XIII.]

In action *ex contractu* absence of plaintiff ground for objection.

If grounds alleged for omission of plaintiffs which defendant disputes.

On plea in abatement, or notice, plaintiff might amend without leave.

In actions *ex delicto*, objection open on plea in abatement only; but if really *ex contractu*, subject to rules already stated.

In actions *ex contractu*, nonjoinder of defendant only open on plea in abatement.

(a) 15 & 16 Vict. c. 76, s. 35.

(b) Common Law Procedure Act, 1852, s. 36, R. G. H. 1853, rule 6.

(c) *Bloxham v. Hubbard*, 5 Ea. 407; *Broadbent v. Ledward*, 11 A. & E. 209; *Addison v. Overend*, 6 T. R. 766; *Sedgworth v. Overend*, 7 T. R. 279.

(d) *Weal v. King*, 12 Ea. 452.

(e) See *Bretherton v. Wood*, 3 B. & B. 54.

(f) *Rice v. Shute*, 5 Burr. 2611.

(g) *Ascue v. Hollingworth*, Cr. El. 544; *Cabell v. Vaughan*, 1 Vent. 34; 1 Saund. 291; see also 3 & 4 W. 4, c. 42, s. 8; *Whelpdale's Case*, 5 Co. 118 b, 119; *South v. Tanner*, 2 Taunt. 254.

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[RULE XIII.]

Exceptions.

Carrier.

Co-contractor
bankrupt dis-
charged.Apparent ex-
ception, 25 &
26 Vic. c. 89,
s. 48.

Not real.

Co-contractor
infant should
not be joined.But query
since 37 & 38
Vic. c. 62.

of each who executes, and he may be sued in a separate action (a). If there is no several obligation the whole action fails (b), and the defence should be pleaded in bar, as in that case it cannot be averred that the omitted defendant executed the instrument. There were also at law some exceptions, in which it was no objection to a separate action that others were bound by the contract jointly with the defendant. By statute 1 W. 4, c. 68, s. 5, in an action against a common carrier for loss of or injury to goods or person committed to him for carriage, it does not abate for want of joining a co-proprietor or co-partner. If one of the co-contractors have obtained his discharge as a bankrupt, he need not be joined in an action against the others (c), and if he be joined and plead his discharge the plaintiff might enter a *nolle prosequi* and pay costs (d), which would be no discharge against the other defendant (e). If the bankrupt have not obtained his order of discharge he should still have been joined, although the plaintiff had proved against his estate; but a replication of his discharge was good in answer to a plea of nonjoinder if the discharge was obtained after action and before replication; and it has been held that counts on promises by defendant and a bankrupt who had since obtained his certificate might be joined with others on promises made by defendant alone (f). There is sometimes numbered as a third exception to this rule a provision of the Companies Act, 1862 (25 & 26 Vic. c. 89, s. 48), which provides that if a company carry on business for a period of six months after and when the number of its members has become less than seven, every one of its members during the time it so carries on business after the said period of six months, who is cognisant of the fact that it is so carrying on business with less than seven members, shall be severally liable for the payment of all the debts of the company contracted during such time, and may be sued for the same without the joinder of any other member. But this is a substitution of the liability of a natural person for a corporation, not of a separate liability of one person for a joint liability of himself and another. There was a similar enactment as to the several liability of members in a partnership of more than twenty not registered under 20 & 21 Vic. c. 14, s. 3; but that statute was repealed by 25 & 26 Vic. c. 89, s. 205, except as to liabilities actually incurred under it, all which it is supposed have by this time expired. If one of the co-contractors be an infant he need not be joined, and not only need not, but should not (g), unless the infant admits his liability; for, in the latter case, if the plaintiff had omitted him and the other defendant had pleaded in abatement his nonjoinder, and the infant had appeared and proved that he had not rescinded the contract, the plaintiff was formerly defeated (h); but if he did not admit his liability, then a plea of nonjoinder might have been met by a replication of his infancy and repudiation, which would have defeated the plea (i); and since 37 & 38 Vic. c. 62, it would seem no repudiation would be wanting. The difference between the case of an infant co-contractor and a femme covert in the same condition was that in the latter case the contract by the femme covert was void *ab initio*, and

(a) *Underhill v. Horwood*, 10 Ves. 225.(b) *Evans v. Brembridge*, 2 K. & J. 174; *Latch v. Wedlake*, 11 A. & E. 959; *Underhill v. Horwood*, 10 Ves. 225.

(c) 3 & 4 W. 4, c. 42, s. 9.

(d) 3 & 4 W. 4, c. 42, s. 32.

(e) *Noke v. Ingham*, 1 Wils. 89; *Moravia v. Hunter*, 2 M. & S. 444.(f) *Hawkins v. Ramsbottom*, 6 Taunt. 179.(g) *Burgess v. Merrill*, and cases cited there, 4 Taunt. 468.(h) *Boyle v. Webster*, per Patteson, J., 17 Q. B. 956; see also *Gibbs v. Merrill*, 3 Taunt. 307.(i) *Burgess v. Merrill*, 4 Taunt. 468; *Boyle v. Webster*, 17 Q. B., per Patteson, J., 956.

there was no necessity to show any repudiation ; but the femme covert should not have been joined in any case. The Act 37 & 38 Vict. c. 62 has now made, it would seem, the law as to an infant the same as that of a femme covert in this respect, except as to necessities.

By 9 G. 4, c. 14 it was provided that in case of joint contractors or executors or administrators of a contractor, no such contractor, executor, or administrator should lose the benefit of the Statute of Limitations so as to be chargeable in respect of or by reason only of any written acknowledgment or promise made, signed by any other or others of them ; and that in actions to be commenced against two or more joint contractors or executors or administrators, if it should appear at the trial or otherwise that the plaintiff, though barred by the said Act or by that Act as to one or more of such joint contractors or executors or administrators, should nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise or otherwise, judgment might be given and costs allowed for the plaintiff as to such defendant or defendants against whom he should recover, and for the other defendant or defendants against the plaintiff. And by the following section, if any defendant or defendants in any action on any simple contract should plead any matter in abatement to the effect that any other person or persons ought to be jointly sued, and issue were joined on such plea, and it should appear at the trial that the action could not, by reason of the said Act or that Act or of either of them, be maintained against the other person or persons named in such plea or any of them, the issue joined in single plea should be found against the party pleading the same.

The effect of this statute was to protect the plaintiff from failure in whichever form he brought his action, whether he joined all the original parties, or only proceeded against those whose liability had been kept alive, but it charged him in the former case with the costs of the successful defendants ; but as it only applied where the written acknowledgment or promise amounts to a new and exclusive engagement, the course of proceeding on this alone against those only who are parties to it may be attended with risk.

But by later statutes the inconvenience of the old rules at law as to pleas in abatement for nonjoinder were greatly relieved even before the new Rule : thus by 3 & 4 W. 4, c. 42, s. 10, it was enacted that in all cases in which after such plea in abatement the plaintiff should, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants, in the action in which such plea in abatement should have been pleaded, and the person or persons named in such plea in abatement as joint contractor, if it should appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants were liable, but that one or more of the persons named in such plea in abatement or any subsequent plea in abatement were not liable as a contracting party or parties, the plaintiff should nevertheless be entitled to judgment, or to verdict and judgment as the case might be, against the other defendant or defendants who should appear to be liable ; and every defendant who was not so liable should have judgment, and should be entitled to his costs, as against the plaintiff who should be allowed the same costs in the cause against the defendant or defendants who should have so pleaded in abatement the nonjoinder of such person : Provided that any such defendant who should have so pleaded in abatement should be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement. This provision it will be seen required to bring it into effect that on the trial "*all the original defendants*" should be found liable : the plaintiff should therefore in the first instance have joined none against whom he was not certain.

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[RULE XIII.]

9 G. 4, c. 14.

Effect of
statute.

3 & 4 Wm. 4,
c. 42, s. 10.
Consequence
of plea in
abatement if
parties named
in plea prove
not liable.

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[RULE XIII.]

15 & 16 Vict.
c. 76, ss. 38 & 39.
Amendment
allowed on
plea in abate-
ment being
filed.

Costs of plea,
&c.

Semble new
rules only
apply to
matters un-
touched by
Common Law
Procedure Act,
1852.

Nonjoinder of
defendants in
actions pro-
perly ex
delicto.

By the Common Law Procedure Act, 1852, s. 38, it was provided that in any action on contract where the nonjoinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff should be at liberty without any order to amend the writ of summons and the declaration by adding the name or names of the person or persons named in such plea in abatement as joint contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants and the person or persons so named in such plea in abatement: Provided that the date of such amendment should, as between the person or persons so named in such plea in abatement and the plaintiff, be considered for all purposes as the commencement of the action: And by s. 39 that in all cases after such plea in abatement and amendment, if it should appear upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original defendant or defendants, the original defendant or defendants should be entitled as against the plaintiff to the costs of such plea in abatement and amendment; but if at such trial it should appear that the original defendant or any of the original defendants was or were liable, but that one or more of the persons named in such plea in abatement was or were not liable as contracting parties, the plaintiff should nevertheless be entitled to judgment against the other defendant or defendants who should appear to be liable; and every defendant who was not so liable should have judgment, and be entitled to his costs as against the plaintiff who should be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the cause against the original defendant or defendants who should have so pleaded in abatement the nonjoinder of such person: Provided that any such defendant who should have so pleaded in abatement should be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

Under these enactments it was held where the defendant pleaded in abatement, and the plaintiff amended, and the defendant then paid money into Court as to part, and pleaded the general issue as to the residue, and the plea in abatement and the general issue were found for him, that he was entitled to the costs of the plea in abatement, and the amendment, and the general costs of the cause and of the trial (a).

It is submitted that these provisions of the Common Law Procedure Act, 1852, which have virtually superseded the earlier enactments or some of them, are not inconsistent with the new Rule, are therefore still in force, and that the new Rule will only be used in cases not provided for in these enactments.

As to nonjoinder of defendants in actions *ex delicto*, properly so called, there was no objection on any such head (b); but if the action, though in form *ex delicto*, were substantially *ex contractu*, then the rule applicable to such last-named actions was applied (c). *Govett v. Radnidge* (b) seems to be at variance with some of the other cases, but when examined will seem to be reconcilable on the ground that in this case a duty existed independent of the contract, by breach of which duty the damage accrued, though, no doubt, but for the contract the custody in which the duty arose might never have been acquired: it resembles in this respect the case of carriers who are each liable for the due carriage of the goods committed

(a) *Cazneau v. Morrice*, 25 L. J. Q. B. 126.

(b) *Govett v. Radnidge*, 3 Ea. 62; *Sutton v. Clarke*, 6 Taunt. 29; *Mitchell v. Tarbutt*, 5 T. R. 649.

(c) *Powell v. Layton*, 2 B. & P. N. R. 365; *Max v. Roberts*, *ib.*, 454; *Weal v. King*, 12 Ea. 452.

to them (a) ; but this liability is confirmed by statute before mentioned in the case of land carriers, 1 Will. 4, c. 68, s. 5.

By a consideration of the notes preceding annexed to this rule it will at once be seen that the practice is considerably altered, and that many things may now be done which would formerly have been altogether impracticable. The discretion of the Court in the frame of actions before it now is very greatly enlarged, and almost any change may be made which seems on any ground of true justice to be desirable. The following cases have been decided under this rule, in some of which useful general rules of practice have been laid down or hinted ; but many of them seem to have been exercises of discretion applied to the circumstances of individual cases from which it is difficult, if not impossible, to derive any general rules of conduct. In *Lovell v. Holland* (b), a defendant being sued for mesne profits for holding land of the plaintiff's while the latter was in a lunatic asylum, sought to make the plaintiff's sister, to whom he alleged he had paid rent for the land, a party. The Master disallowed the application. Archibald, J., is reported to have said : "The procedure, of which the defendant wishes to avail himself, rather contemplates the case of a defendant who is not liable, or who is to a great extent free from any default. Here the defendant is a trespasser. Why should the plaintiff be put to prove that any money was paid to Miss Lovell? If the defendant was led to believe that Miss Lovell was the person to whom the rent should be paid, and paid her under a mistake of fact, he has a simple remedy against her for money had and received ;" and the appeal was dismissed with costs. On an application to add a defendant in an action under the Bills of Exchange Act, the statement of claim had been delivered, and the defendant had obtained leave to appear, it was ordered that the defendant be at liberty to have third party joined as defendant (c). On the other hand, on a contract alleged to be joint between the plaintiff on the one side and the defendant and a deceased party on the other, an application made when the case had come on for trial, to join the executors of the deceased party as defendants, was refused at that stage of the proceedings (d). A lessor and a lessee being sued together by a builder for repairs done to a house, the lessor sought to have his name struck out, alleging that the lessee was liable for all repairs. Lush, J., refused the application, stating that the applicant had mistaken the meaning of the rule, the plaintiff saying, by this form of pleading, that he was not sure which was liable, and so had sued them both (e). On a summons to add plaintiffs under r. 2, it was held that it must under that rule be shown (1) that there was a *bonâ fide* mistake as to the issue of the writ, and (2) that the change sought is necessary. But Huddleston, J., held that though there was no affidavit of *bonâ fide* mistake, this rule might be brought in to aid the plaintiff ; but he required the original plaintiff to give security for costs, and made the order to join the new plaintiffs (f). In an action by ship-owner against two consignees of goods carried by him for demurrage, there was a counterclaim for damage to cargo, the plaintiff took out summons to add parties as plaintiffs, being part-owners, and jointly liable to counterclaim. The order was refused by the Master, and appeal dismissed with costs, as a plaintiff cannot be added against his will (g). In an action by a merchant against solicitors for negligence : they answered that the negligence,

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[RULE XIII.]

Cases under
this rule.

(a) *Ansell v. Waterhouse*, 6 M. & S. 385 ; *Bretherton v. Wood*, 3 B. & B. 54 ; *Pozzi v. Shipton*, 8 A. & E. 963, 1 P. & D. 4.

(b) W. N. 1876, 53 ; 20 S. J. 279.

(c) *Anon.*, W. N. 1876, 23 ; 20 S. J. 242.

(d) *Williams v. Andrews*, W. N. 1875, 237 ; 20 S. J. 100.

(e) *Anon.*, W. N. 1875, 203 ; 20 S. J. 57.

(f) *Smith v. Haseltine*, W. N. 1875, 250 ; 20 S. J. 140.

(g) *Cormack v. Grofrian and others*, W. N. 1876, 22 ; 20 S. J. 240.

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this rule.

if any, was that of K., whom the defendants had instructed. The Master had ordered K. to be added, but the plaintiff appealed. Held that the case was not within this rule, and the order of the Master was reversed (*a*). It appears in this case that it was thought the application should have been made under rr. 17, 18, or 19, which see *post*, in which the party sought to be added would receive notice and be entitled to appear or not, as he pleased; but on the report it does not seem clear what was the ground of the decision.

An hotel was built by a company and furnished by the defendant. The company was wound up and the furniture sold by auction by the agreement of all parties. The auctioneer sued the defendant alone, who sought to have the official liquidator, for whom it was alleged the auctioneer sold, joined as a plaintiff in order to plead a counter-claim and have the accounts between them taken in the action. No order was made on the application save that the costs were to be costs of the plaintiff (*b*). An action by one of joint owners of a ship against charterers: the defendants applied to have the other owners joined as plaintiffs. The application was refused on the ground that it was an attempt to re-introduce the mischief of pleas in abatement (*c*). An action was brought for libel against a publisher of a newspaper. An application was made to have the name of the proprietor added as defendant, reference being made to rr. 3 and 17, which see. The addition was made (*d*). By a consent order in another suit the plaintiff had abandoned his claim against certain defendants in this suit, and an application was made to strike them out as parties. Order that they should be struck out with costs since the date of the consent order, and it was stated by the Court that the order should be applied for as early as possible after it appears that it is needless or improper that one should continue a party (*e*). The old Westminster Brewery Company had transferred "all its property, estates, and effects with the appurtenances," including a mortgage "with the benefit of all securities," for the amount due to the new company, the present plaintiffs. At the date of the transfer the old company claimed a right of action for breach of trust in respect of the said mortgage against the defendants. The question was whether this right of action passed to the new company, and, if not, whether the plaintiffs could join the old company as co-plaintiffs under this rule. The Vice-Chancellor held the right of action did not pass, and that as the plaintiffs had no right of action, they could not join the old company as co-plaintiffs (*f*). In this case it seems to have been decided in the first instance that there was no assignment by the deed of the right of action mentioned from the old company to the new, though at first sight it would seem that the words would have been sufficient to pass it, having regard to s. 25, subs. 6. An action may be amended by transformation into an information and action without prejudice to a pending notice of motion for an injunction, the necessary sanction of the Attorney-General being obtained (*g*).

In an action on a bill of exchange an application was made to add the

(*a*) *Lereculey v. Harrison*, W. N. 1876, 39; 20 S. J. 259.

(*b*) *Beck v. Dear*, W. N. 1876, 40; 20 S. J. 260.

(*c*) *De Hart v. Stevenson*, 1 Q. B. D. 313; 45 L. J. Q. B. D. 575; 24 W. R. 367.

(*d*) *Edwards v. Lowther*, 45 L. J. C. P. D. 417; 34 L. T. N. S. 255; 24 W. R. 434.

(*e*) *Vallance v. The Birmingham and Midland Land and Investment Corporation*, 2 Ch. D. 369; 24 W. R. 454.

(*f*) *New Westminster Brewery Co. v. Hannah*, W. N. 1876, 215; 24 W. R. 899; on appeal, W. N. 1877, p. 35; 21 S. J. 278.

(*g*) *Caldwell v. Pagham Harbour Reclamation Co.*, 2 Ch. D. 221; 45 L. J. Ch. D. 796; 24 W. R. 690.

name of the Niger Merchants Company as defendants: the defendant alleged that he had accepted the bill in part payment of the purchase-money of a ship which he had agreed to buy from the plaintiffs; that he was only acting in such purchase as trustee for the company, which, at the time of the purchase, was in course of constitution, but not actually registered; that the plaintiffs had been guilty of various fraudulent representations as to the ship, by reason whereof the company had incurred expenses which had been useless, and he sought to add the company as defendants in order, as a counter-claim might be pleaded by them in respect of the damages occasioned to them by this alleged fraud. The application was refused (*a*) on the ground that persons sought to be made defendants under this rule must be parties against whom the plaintiff has a cause of action, and not such as a defendant merely wishes to add for his own convenience.

In *Kino v. Rudkin*, an action to restrain an alleged obstruction to lights, the defendant stated that since the commencement of the action he had assigned his interest in the property in question to one not a party, and asked for an order under this rule to add the assignee as co-defendant to the action. No objection being made, Fry, J., said he did not think it necessary: as the assignment was *pendente lite*, the assignee would be bound; but it was perhaps more convenient that he should be a party, and the order was therefore made (*b*). And see on this rule also *Manchester, Sheffield, and Lincolnshire Railway Co., and London & N. W. Railway Co. v. Brookes* (*c*). See also the case of *Harry v. Davey*, or *Harvey v. Davey* (*d*). If a plaintiff has been added, no one but himself has any right to move for his removal (*e*). With reference to this rule see also *ante*, r. 2; *post*, rr. 17, 18, 19.

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[RULE XIII.]

Cases under this rule.

14. Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a Judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.

[RULE XIV.]

To strike out or substitute party.

It is not easy to see on whose application a new plaintiff ought to be substituted, save in the case of two or more co-plaintiffs; the new plaintiff is not before the Court yet, and the old plaintiff ceases to be before it on the order being made, and no defendant would at first sight seem to have any right to require another person to sue him. See, however, *O. L.*, r. 4.

With reference to this order see *Vallance v. Birmingham and Midland Land and Investment Corporation* (*f*), note to r. 13, *ante*, p. 242.

In the case of consolidated actions it was held that r. 15 does not apply, and the Master of the Rolls made an order to make a new defendant under r. 14, as legal representative of intestate without service of any summons on him or any further indorsement of any writ (*g*).

15. Where a defendant is added, unless otherwise ordered

[RULE XV.]

(*a*) *Norris v. Beazley*, 2 C. P. D. 80; 46 L. T. C. P. D. 169; 35 L. T. N. S. 846; 25 W. R. 320.

(*b*) 21 S. J. 689.

(*c*) *Ante*, p. 223; 2 Ex. D. 243; 46 L. J. Ex. D. 244; 36 L. T. N. S. 103; 25 W. R. 413.

(*d*) *Post*, p. 246; 2 Ch. D. 721; 45 L. J. Ch. D. 697; 34 L. T. N. S. 842; 24 W. R. 576.

(*e*) *Duckett v. Gover*, W. N. 1877, 80.

(*f*) 2 Ch. D. 369; 24 W. R. 454.

(*g*) *Re Wortley*, 4 Ch. D. 180; 46 L. J. Ch. D. 182; 25 W. R. 295.

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[RULE XV.]

Where defend-
ant added,
plaintiff to
amend.

by the Court or a Judge, the plaintiff shall file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served.

It does not seem by this to be necessary to make any service of the amended writ on defendants already served, though how they are to be informed of the amendment does not clearly appear.

[RULE XVI.]

Where state-
ment of claim
delivered
before defend-
ant added, it
shall be
amended, &c.

16. If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or a Judge, be amended in such manner as the making such new defendant a party shall render desirable, and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice or afterwards, within four days after his appearance.

A similar remark applies in the case of this rule.

[RULE XVII.]

Where third
person not
party seems
involved in
remedy, Court
on notice to
him to make
order for
settling
question.

17. Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a Judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined.

Remarks on
rule.

This rule introduces new powers. It would or might introduce, by a new procedure, the result which hitherto was effected by the intervention of pleas of nonjoinder and consequent amendment; but it is by no means confined in its application to cases of this kind. It has at least the effect, in many cases, of consolidating into one action what would formerly have given rise to two or more; but it seems that it may also have the effect of bringing into Court persons who were quite willing to have done what they ought without any compulsion, when they had discovered what it was they ought to do, and who, formerly, would not have been brought into Court at all. The Rule of Court providing for the operation of this rule is r. 19 of this Order.

Cases under
this rule.

There have been a good number of cases decided under this rule, but it cannot be said that in consequence the practice has been rendered in any great degree plain and simple, as the cases do not seem to be at all coincident in principle. Thus in an important case (a) which

(a) *Treleven v. Bray*, 1 Ch. D. 176; 45 L. J. Ch. D. 113; 33 L. T. N. S. 827; 24 W. R. 198.

was decided by the Court of Appeal, it was declared by Mellish, L. J., that the object of the rules relating to notice to third parties is merely to bind the third party by the decision of the Court in the present action. If the original defendant wishes to get an indemnity from or other relief against the third party, he must bring an action for that purpose. It was never intended that one defendant should have a counterclaim against another defendant. The Court, however, in that case gave leave to the defendants, upon obtaining the consent of the plaintiffs, to serve an unwilling trustee not party to the suit, by whose objection to convey they were prevented from performing their contract to convey to the plaintiffs with notice under this rule. Several cases have followed this view (a), but some that have been dissonant from it (b). In *Macdonald v. Bode* (c) it was distinctly held that the power of introducing third parties in an action given by s. 24, subs. 3, is wider than this rule or the 18th provides for; and the apparent truth of this position, if the narrow construction given by Lord Justice Mellish in *Trevelan v. Bray* to this rule be the true one, was the great argument against that construction. As it was properly urged, the rules and orders are to carry out, not to limit, the Act, and must be held to be wide enough to enable the Acts to be enforced, so that if *Macdonald v. Bode* is recognised and confirmed, it is an authority strengthening the former rule in *Trevelan v. Bray* (d). In *Tebbs v. Lewis* (e), which was an action by an intending purchaser against the auctioneer for his deposit money, notice under this section had been served on the vendor, who claimed the deposit money as forfeited. The original defendant claimed a portion of the sum as commission. Lush, J., said this was one of the very cases contemplated by the Act, and directed the third party, the vendor, to come in as a party, and be bound by the verdict. Costs to be plaintiff's costs in the cause. See also the case of *Benecke v. Frost* (f).

The case of *Measures v. Thomas* (g), though properly occurring under the next rr. 18, 19, 20 and 21, is deserving of notice here. It was an action for price of iron-work, and the defendants had given notice to a third party under the above-mentioned rules, that they claimed to be indemnified by him. It appeared that Smaley, the third party, had contracted to build a warehouse, and the defendants were to find the iron-work, Smaley paying them 80 per cent. nett cash for it. Notice was given by the defendants under r. 18, and the appearance of Smaley was under r. 21. The defendants admitted their liability to the plaintiff, and the question was whether Smaley should indemnify them to the full amount or only to 80 per cent. Smaley had already tendered the smaller sum to the defendants, and they desired that such an order should be made as would estop him from disputing the amount, that at the trial the defendants should be held liable to pay to the plaintiff. Lush, J.: "That is exactly the object of the rule. Upon an affidavit of service and non-attendance of Smaley, I order that Smaley, if liable, do not dispute the amount due from the defendants to the plaintiff. Then Smaley is bound, when he brings his action of indemnity, by the amount paid to the

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[RULE XVII.]

Power of introducing third parties.

Measures v. Thomas.

(a) *Seligman v. Mansfield*, W. N. 1875, 240; 20 S. J. 121; *Warner v. Twining*, 24 W. R. 536; *Swansea Shipping Co. v. Duncan*, 1 Q. B. D. 644; 45 L. J. Q. B. D. 638; 35 L. T. N. S. 879; 25 W. R. 233.

(b) *Northampton Waterworks Co. v. Euston*, per Lord C. J., 20 S. J. 467; *Young v. Brassey*, 21 S. J. 48; see post, O. XXII., r. 9.

(c) W. N. 1876, 23; 20 S. J. 241.

(d) See note (a), p. 244.

(e) W. N. 1875, 204; 20 S. J. 56.

(f) *Post*, p. 248; 1 Q. B. D. 419; 45 L. J. Q. B. D. 693; 34 L. T. N. S. 728; 24 W. R. 669.

(g) W. N. 1875, 203; 20 S. J. 55.

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RULE XVII.

Indemnity
against third
parties.

plaintiff. In the event of Smaley being held liable to indemnify the defendants, the cost of this summons to be the defendants'." Under this rule leave was given to an acceptor of a bill in an action against him by the indorsee to serve the drawer with notice that the defendant claimed indemnity against him (*a*). See also rr. 5, 18, 19. A. agreed to purchase lands of B., who purported to sell under power of sale in a mortgage. After the agreement, A. received notice from D., E., and F., claiming title to the lands, and refused to complete. B. brought an action against him for specific performance. On motion by A. for leave to serve D., E., and F., with notice of motion to make them parties to the action, the Court gave such leave (*b*); but on the hearing of the motion refused the order, as no question arose rendering their presence necessary (*c*). In the case of *Commissioners of Waterford v. Veale, Bogg, and Evans*, defendants served third persons, against whom they claimed indemnity; they consented to come in and defend; but the plaintiffs objected unless the new parties admitted liability on their doing so. Order was that they should be defendants, they admitting the cause of action and liability (*d*). In an action by builders for work done under contract to build a church: the defendants desired to serve architect with notice that they claimed indemnity from him, he having ordered costly extras without authority. An order was made for leave to serve him (*e*). See on this case rr. 18 and 19.

The power to order third parties to be served with reference to rr. 17, 18, 19, 20, and 21, is discretionary, and will not be used if it seems to lead to the prejudice of the plaintiff (*f*). Where it was desired to raise points between co-defendants, Vice-Chancellor Hall expressed his opinion that in this rule the notice mentioned applied only to strangers, and he finally ordered the points to be raised by counter-claim, and made an order under this rule for a defence and counter-claim to co-defendant interested (*g*). But the Master of the Rolls has held on several occasions that no counter-claim can be set up which does not seek relief against the plaintiff (*h*). An action was brought to restrain B. and his five tenants from permitting foul water to flow from five houses belonging to B., into the watercourse of the plaintiff. C., one of the five tenants, delivered a defence denying the plaintiff's title and the fact of the nuisance, and making a so-called counter-claim against B., averring a contract on his part for quiet enjoyment, and claiming indemnity from him against any damages and costs which he, C., might be compelled to pay to the plaintiffs. The Master of the Rolls said that a pleading which claimed no cross relief against the plaintiff either alone or with some other person was no "counterclaim," and did not fall within O. XXII., r. 5 (which see). Under the Act of 1873, s. 24, subs. 3, the relief sought by C. required to be pleaded, and it was necessary to give notice of the pleading to the co-defendant under the Act and under this rule. He thought the delivery of the pleading to one already a defendant was sufficient notice under this rule. He would therefore merely order the word "counterclaim" to be struck out, dissenting

What is a
counterclaim.

(a) *Pearson v. Lane*, W. N. 1875, 248; 20 S. J. 122.

(b) *Harvey v. Davey*, W. N. 1876, 141; 24 W. R. 515, *sub nom. Harry v. Davey*.

(c) *Harvey v. Davey*, 2 Ch. D. 721; 45 L. J. Ch. D. 697; 34 L. T. N. S. 842; 24 W. R. 576.

(d) W. N. 1876, 23; 20 S. J. 241.

(e) *Dawes v. Thornton*, W. N. 1876, 74; 20 S. J. 299.

(f) *Bower v. Hartley*, 1 Q. B. D. 652; 46 L. J. (App.) Q. B. D. 126; 24 W. R. 941.

(g) *Shepherd v. Beane*, 2 Ch. D. 223; 45 L. J. Ch. D. 429; 24 W. R. 363.

(h) *Warner v. Twining*, 24 W. R. 536; see also *Swansea Shipping Co. v. Duncan*, 1 Q. B. D. 644; 45 L. J. Q. B. D. 638; 35 L. T. N. S. 879; 25 W. R. 233; *Furness v. Booth*, 4 Ch. D. 586; 46 L. J. Ch. D. 112; 25 W. R. 267.

from *Shepherd v. Beane* (a), in which it had been laid down, as he thought incorrectly, that a counterclaim was the right form of pleading between co-defendants; but as that case had been decided, he gave no costs of this application (b).

An action was brought by a shipowner against the consignee of goods under a bill of lading, claiming damages for delay in unloading. Defendant served a notice under r. 18 upon the London Banking Association, who had bought the cargo afloat, and an order was obtained that the defendant and the third party might defend conjointly. The London Banking Association then took out a summons for leave to give notice to and bring in a fourth party to whom they had re-sold cargo afloat. Field, J., at Chambers, had refused the order, but on appeal joined with Cleasby, B., in granting it, observing that had his attention been called to the last clause in s. 24, subs. 3, of the Act of 1873, he would not have refused the order (c).

A plaintiff brought his action for injuries sustained by negligence of defendants. Their statement of defence alleged that injuries were caused through the rails of T. Company not being on a level with the road, and through the bad condition of the road and rails. They served notice on T. Company, making them defendants. Held that the notice must be set aside, there not being a "question in the action," which it was desirable to decide between the T. Company and the defendants, reversing decision of Exchequer Division (d). See on this rule also *Padwick v. Scott* (e), hereafter cited; and *Street v. Gover* (f).

18. Where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a Judge, be served within the time limited for delivering his statement of defence. Such notice may be in the form or to the effect of the Form No. 1 in Appendix (B) hereto with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action.

This rule, and the three following, provide for an entirely new practice, on which the cases mentioned have been decided.

Most of the cases noted under the last r. 17 are also of authority under this rule, and it is therefore requested that reference be made to them without repeating them here. The following cases may also be here noted:

(a) See note (g), p. 246.

(b) *Furness v. Booth*, *supra*.

(c) *Fowler v. Knoop*, W. N. 1877, 68; 36 L. T. N. S. 219.

(d) *Horwell v. London and General Omnibus Co.*, 2 Ex. D. 365; 36 L. T. N. S. 637; 25 W. R. 610.

(e) *Post*, p. 255; 2 Ch. D. 736; 45 L. J. Ch. D. 350; 24 W. R. 723.

(f) *Ante*, p. 29; 2 Q. B. D. 498; 46 L. J. Q. B. D. 582; 36 L. T. N. S. 766; 25 W. R. 750.

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[RULE XVII.]

[RULE XVIII.]

Where defendant claims over against person not party, to serve such person by leave with notice.

Purport of notice.

Form of notice.

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COURT.

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[RULE XVIII.]

*Benecke v.
Frost.*

A claim was made by plaintiffs against defendants for not accepting 183 chests of shellac according to contract of 10th November, 1874, whereby the defendants ordered of plaintiffs 183 chests of fine button shellac at £13 10s., cost of freight, free from gum, and a maximum of three per cent. rosin. That the plaintiffs bought the shellac, and at defendants' request paid freight. Defence delivered 23rd March, 1876, that defendants bought as brokers for principals, as plaintiffs knew, and defendants are not personally liable as to part, the principals being Rea & Co., and as to the residue, Thew Brothers. That the defendants did not request the plaintiffs to pay the freight for them. That the shellac was not according to quality contracted for, and therefore the defendants and their principals respectively refused to accept the different parcels. Reply was delivered 31st March, and joinder of issue and demurrer. On February 12th, 1876, Thew and Rea were respectively served with notices under this r. 18, that the defendants were sued by plaintiffs for non-acceptance of 183 cases of shellac, under contracts to purchase by defendants from plaintiffs; that defendants claimed to be indemnified by them against all liability in respect of fifty chests, on the ground that defendants ordered the chests of plaintiffs on their behalf, as their agents. Rea and Thew entered appearance within eight days, and application was made to the Court under r. 21 for directions as to the mode of having the questions in the action determined. The Court directed a statement of defence to be first delivered. The application was now renewed on affidavits setting out contracts between the defendants and Rea and Thew respectively, of the 11th November, 1874, for purchase of fifty chests on similar terms as the contract between plaintiffs and defendants. The Court held that Rea and Thew were properly cited, and directed that Thew should be allowed to appear at trial to contest the question of quality of shellac, and no other question; Thew and Rea to be bound by result. Question of costs to be decided after trial by a Judge, subject to an appeal to Court (a).

Right over
against person
not party to
action.

C. bought goods on credit from H. After delivery, but before time for payment, C. became bankrupt. H., when time for payment arrived, commenced an action against S. for the price, alleging that C. had bought the goods on the authority of S., and either on account of S. or on a joint account of C. and S. S. thereupon served the trustee of C. with notice under this rule. The trustee then applied for and obtained in Bankruptcy an order restraining S. from taking or continuing any proceedings against the trustee under O. XVI. Held on appeal that this order must be discharged, for that the case between H. and S. could not be tried in bankruptcy, and that S., if found liable in the action, ought not to have to try the same question again in Bankruptcy between himself and the trustee (b). See also case before cited, *Horwell v. London General Omnibus Co.* (c); *Norris v. Beazley* (d).

[RULE XIX.]

Where third
person not
party seems to
Court desir-
able for de-
cision of
question,
Court to order
plaintiff to
give notice.

19. When under Rule 17 of this Order it is made to appear to the Court or a Judge at any time before or at the trial that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and the defendant and any other person, or between any or either of them, the Court or a Judge, before or at the time of making the order for having such question

(a) *Benecke v. Frost*, 1 Q. B. D. 419; 45 L. J. Q. B. D. 693; 34 L. T. N. S. 728; 24 W. R. 669.

(b) *Ex parte Smith*, 2 Ch. D. 51; 45 L. J. Bankcy., 116; 34 L. T. N. S. 603; 24 W. R. 310.

(c) 2 Ex. D. 365; 34 L. T. N. S. 637; 25 W. R. 610.

(d) *Ante*, p. 243.

determined, shall direct such notice to be given by the plaintiff at such time and to such person and in such manner as may be thought proper, and if made at the trial the Judge may postpone such trial as he may think fit.

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[RULE XIX.]

The cases on r. 17 may many of them be referred to as authorities under this rule also.

20. If a person not a party to the action, who is served as mentioned in Rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise. Provided always, that a person so served and failing to appear within the said period of eight days may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or a Judge shall think fit.

[RULE XX.]

Where person not party served under Rule 18 wishes to dispute plaintiff's claim, to enter appearance.

Failing to appear in time may apply for leave to appear.

A similar remark to that on last rule applies here also.

If the order giving leave to effect service out of the jurisdiction provided for by O. XI., r. 4, allows more than eight days for appearance, then this rule must be modified accordingly, to meet the case, and the party cited will be in time if he enter appearance within the time allowed by the order under O. XI., r. 4, though beyond the eight days (a).

21. If a person not a party to the action served under these Rules appears pursuant to the notice, the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the question in the action determined; and the Court or a Judge, upon the hearing of such application, may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions as to the Court or a Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question.

[RULE XXI.]

If person not party appear on notice, party giving notice may apply for directions as to hearing, Court to make order accordingly.

(a) *Swansea Shipping Co. v. Duncan, Fox, & Co.*, 1 Q. B. D. 644; 45 L. J. Q. B. D. 638; 35 L. T. N. S. 879; 25 W. R. 233.

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[RULE XXI.]

On this rule see *Measures v. Thomas* (a); *Tebbs v. Lewis* (b); *Benecke v. Frost* (c); *Norris v. Beazley* (d); *Bower v. Hartley* (e). In an action on a bill of exchange by holders against acceptors, notice by the defendants on drawers that they claimed part indemnity; the drawer appearing, an application was made by the defendants for directions as to future proceedings. Order that the defendants undertaking to pay the plaintiffs £——, and interest; and on payment of the further sum of £95 and interest by the drawer to plaintiffs, the drawer to be substituted as plaintiff in the action, and at liberty to proceed for £—— (f). See also on this rule, the case before cited of *Horwell v. London General Omnibus Co.* (g).

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ORDER XVII.

JOINDER OF CAUSES OF ACTION.

[RULE I.]

Plaintiff may
join several
causes of action,
Court may
order
separation
where wanted.

1. Subject to the following Rules, the plaintiff may unite in the same action and in the same statement of claim several causes of action, but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

This rule is made subject to any Rules of Court. It must, of course, be also subject to ss. 33, 34, and 35 of 36 & 37 Vict. c. 66, which are themselves also subject to any Rules of Court; thus two causes of action belonging to different Divisions of the Court ought clearly not, without reason, to be joined in the same action. See also O. XVI., r. 4, by which each defendant need not be interested in entire relief prayed.

See with reference to this rule *Child v. Stenning* (h), ante, p. 225.

[RULE II.]

Only certain
claims to be
joined with
action for re-
covery of land.

2. No cause of action shall unless by leave of the Court or a Judge be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held.

(a) *Ante*, p. 245; W. N. 1875, 203; 20 S. J. 55.

(b) W. N. 1875, 260.

(c) *Ante*, p. 248; 1 Q. B. D. 419; 45 L. J. Q. B. D. 693; 34 L. T. N. S. 728; 24 W. R. 669.

(d) *Ante*, p. 243; 46 L. J. C. P. D. 515.

(e) *Ante*, p. 28; 1 Q. B. D. 652; 46 L. J. (App.) 1 Q. B. D. 126; 24 W. R. 941.

(f) *National Provincial Bank of England v. Bradley Bridge Charcoal, Iron and Foundry Co.*, W. N. 1876, 63; 20 S. J. 297.

(g) *Ante*, p. 247.

(h) 5 Ch. D. 695; 46 L. J. Ch. 523; 35 L. T. N. S. 426; 25 W. R. 519.

See with reference to this rule, **O. XIII., r. 8.**

Orders have been made under this rule in the cases mentioned below (a). The Master of the Rolls said he would always allow a claim for the recovery of land to be joined with a claim for the recovery of personal estate comprised in the same instrument as the land (b). In *Kitching v. Kitching*, an application for leave to join a claim for administration and a claim for recovery of intestate's real estate was granted (c). In *Allen v. Kennet* an application was made to the Master of the Rolls for leave to join a claim for a receiver of rents and profits of land, with a claim for recovery of the possession of the same land. He granted the leave, but doubted whether it was necessary (d). An action for foreclosure is not an action for the recovery of land within this rule, and requires no leave to join it with other ancillary claims (e).

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[RULE II.]

3. Claims by a trustee in bankruptcy as such shall not, unless by leave of the Court or a Judge, be joined with any claim by him in any other capacity.

[RULE III.]

Claims by
trustee in
bankruptcy
how to be
joined.

4. Claims by or against husband and wife may be joined with claims by or against either of them separately.

[RULE IV.]

Claims by or
against hus-
band or wife.

5. Claims by or against an executor or administrator as such, may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

[RULE V.]

Claims by or
against exe-
cutor, &c.

See on this rule *Padwick v. Scott* (f), cited hereafter.

6. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant.

[RULE VI.]

Joint or several
claims of plain-
tiffs against
same defend-
ants may be
joined.

This rule seems involved in **O. XVI., r. 1.**

7. The last three preceding rules shall be subject to Rule 1 of this Order, and to the rules herein-after contained.

[RULE VII.]

Subject to
Rule 1, &c.

8. Any defendant alleging that the plaintiff has united

[RULE VIII.]

(a) *Whetstone v. Dewis*, 1 Ch. D. 99; 45 L. J. Ch. D. 49; 33 L. T. N. S. 501; 24 W. R. 93; *Manisty v. Kenealy*, 24 W. R. 918; 20 S. J. 211; *Crane v. Jullion*, 20 S. J. 232.

(b) *Cook v. Enchmarch*, 2 Ch. D. 111; 45 L. J. Ch. D. 504; *sub nom. Cook v. Enchurch*, 24 W. R. 293.

(c) W. N. 1876, 225; 24 W. R. 901.

(d) 24 W. R. 845; 20 S. J. 684.

(e) *Tawell v. Slate Co.*, 3 Ch. D. 629.

(f) *Post*, p. 255; 2 Ch. D. 736; 45 L. J. Ch. D. 350; 24 W. R. 723.

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[RULE VIII.]

Defendant may
apply to con-
fine action.

in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time apply to the Court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding.

See on this rule also *Padwick v. Scott (a)*, hereafter cited.

[RULE IX.]

Court on hear-
ing application
may exclude
some causes
and order
amendment.

9. If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as cannot all be conveniently disposed of in one action, the Court or a Judge may order any of such causes of action to be excluded, and may direct the statement of claim or, if no statement of claim has been delivered, the copy of the writ of summons, and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just.

Ord. 18.

ORDER XVIII.

ACTIONS BY AND AGAINST LUNATICS AND PERSONS OF
UN SOUND MIND.

Lunatics and
persons of un-
sound mind to
sue by com-
mittee or next
friend, and be
sued by com-
mittees or
guardians as in
Chancery.

In all cases in which lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action by their committees or guardians appointed for that purpose.

For service of writ of summons on lunatics, &c., see O. IX., r. 5. In default of appearance of lunatic, &c., see O. XIII., r. 1.

Ord. 19.

ORDER XIX.

PLEADING GENERALLY.

[RULE I.]

New rules of
pleading.

1. The following rules of pleading shall be substituted for those heretofore used in the High Court of Chancery and in the Courts of Common Law, Admiralty, and Probate.

"Pleading" is defined by Act of 1873, s. 100.

(a) *Post*, p. 255 ; 2 Ch. D. 736 ; 45 L. J. Ch. D. 350 ; 24 W. R. 723.

2. Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of complaint, the plaintiff shall within such time and in such manner as herein-after prescribed, deliver to the defendant after his appearance a statement of his complaint and of the relief or remedy to which he claims to be entitled. The defendant shall within such time (a) and in such manner as herein-after prescribed deliver to the plaintiff a statement of his defence, set-off, or counter-claim (if any), and the plaintiff shall in like manner deliver a statement of his reply (if any) to such defence, set-off, or counter-claim. Such statement shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire at the instance of any party into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

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[RULE II.]

Plaintiff to deliver statement of complaint.
Defendant to deliver statement of defence, set-off, or counter-claim. Plaintiff to deliver statement of reply.

Independent of any discovery which is afterwards provided for, the system of pleading here sought to be introduced is what pleading in Chancery was heretofore, save, and a most important distinction this is, pleadings now are not on oath.

Pleading on oath abolished.

It may here be remarked that a difference of opinion has been expressed by the Judges in the Chancery Division as to the practice in the case of short causes, the Master of the Rolls (b) having given as his opinion that a defendant consenting to an immediate order for administration ought not to require the plaintiff to file or deliver a statement of claim. On the other hand, Vice-Chancellor Malins required it in *Breton v. Mockett* (c); and again, in *Boyes v. Cook* (d), in which the defendant had expressly waived the statement, Vice-Chancellor Malins remarked that he had already intimated his opinion that a statement was necessary, and he wished to have one in all cases involving the construction of a deed, or any other instrument. Vice-Chancellor Hall, however, seems to have agreed with the Master of the Rolls (e). Thus the practice cannot be held uniformly settled, and it will be well in each case to consider who is the Judge having jurisdiction in the matter. See further as to short causes *Palin v. Brooks* (f), and *post*, O. XXIX., r. 10. Notwithstanding that this rule provides expressly an order as to costs as a remedy in cases of prolixity, yet a prolix statement of claim has been dealt with by an order to amend under O. XXVII., r. 1 (g). See also O. XIX., rr. 4 and 9.

Practice in short causes.

Nothing in this rule or r. 4 in anywise forbids special reply, as was pointed out in the judgment in *Hall v. Eve* (h) on appeal.

(a) For times for various proceedings see Time Table, *post*.

(b) *Taylor v. Duckett*, W. N. 1875, 193.

(c) W. N. 1875, 255; 33 L. T. N. S. 684.

(d) W. N. 1876, 28; 33 L. T. N. S. 778.

(e) *Green v. Colby*, 1 Ch. D. 693; 45 L. J. Ch. D. 303; 24 W. R. 246.

(f) W. N. 1875, 188; 33 L. T. N. S. 322; 24 W. R. 20.

(g) *Marsh v. Mayor and Aldermen, &c., of Pontefract*, W. N. 1876, 7; 20 S. J. 161.

(h) 4 Ch. D. 341; 46 L. J. Ch. D. 145; 35 L. T. N. S. 926; 25 W. R. 177.

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[RULE III.]

Defendant may
set up any
claim whether
liquid or not.

Court may re-
fuse permission
to defendant to
avail himself
of it.

Set off.

Cases under
this rule.

No statement of defence is necessary where there has been no statement of claim (a). See on this rule *Menton v. Metcalf* (b).

3. A defendant in an action may set-off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

This rule enlarges greatly the rules of set-off as at present existing, and allows, in fact, all cross demands to be litigated together, subject to the restriction in the end of the rule provided. Hitherto no set-off could be pleaded which sounded in damages; the sum must be liquid or of such a nature as might be rendered liquid without a verdict to liquidate it; now the merest damages on tort may be urged in counterclaim by a defendant. See *post*, r. 10.

In fact, since the commencement of the new Acts, counterclaims of almost every kind have been allowed. Thus in *Mostyn v. West Mostyn Coal and Iron Co., Limited* (c), the action was for rent on a coal mine unpaid; a counterclaim that portion of the mine was within the plaintiff's knowledge not his property, and that the defendants had been put to expense in obtaining access to that part, the defendants claimed damages for their wasted time and money, and also claimed rectification of the deed. The case finally coming on, on the matter of pleading on demurrer, it cannot be said on the point on which it is cited to be a full authority for the goodness of the counterclaim in form; but it was held that the defence and counterclaim being demurred to, the Common Law Division would not transfer the action to the Chancery Division on the matter of rectification, but would, for the hearing of the demurrer, treat the deed as already rectified.

To an action on a bill of exchange defendant pleaded that plaintiff was a trustee for a third party who was indebted to the defendant on an account which was held as a good counterclaim in defence (d). In *Attwood v. Miller* defendant was allowed, to a claim for rent, to plead, by way of counterclaim, a claim for specific performance and damages (e). So an application was allowed for leave to set off as counterclaim a county court judgment (f); and it has been held that as the payment of money under a rule of Court may be enforced by action, money so due is a fit subject of set-off or counterclaim (g). The Court has even gone far beyond only allowing such claims to be pleaded—it has even allowed them

(a) *Hooper v. Giles*, W. N. 1876, 10; 20 S. J. 217.

(b) *Ante*, p. 216; W. N. 1877, 142; 46 L. J. Ch. D. 584; 36 L. T. N. S. 683; 21 S. J. 609.

(c) 1 C. P. D. 145; 46 L. J. C. P. D. 401; 34 L. T. N. S. 325; 24 W. R. 401.

(d) *MacDonald v. Bode*, W. N. 1876, 23; 20 S. J. 241.

(e) W. N. 1876, 11; 20 S. J. 218.

(f) *Sandys v. Louis*, W. N. 1875, 249.

(g) *Philpott v. Lehain*, 35 L. T. N. S. 855; 20 S. J. 605.

to be set up after issue joined in at least one case (a). With a view of enabling in fact two actions to be decided together as one, and unless on strong grounds of inconvenience, it will not endeavour to refuse to allow a defendant to avail himself of such a claim (b). But such conditions may be annexed to the license to set up such a claim in defence as may preclude the possibility of its being a means of injustice. Thus in *Michael v. Corner* (c), Lush, J., allowed a counterclaim to be set up only on the defendant undertaking to pay the costs of a suit in Chancery which he had commenced to make good the same claim. An action of trover brought by the trustees of a bankrupt against a banker with special count for not applying certain bills as directed: the defendant desired to plead as set-off money due to him by the bankrupt. He had proved under the bankruptcy in America. Quain, J., citing *Phillips v. Allan*, 2 M. & R. 575, and 8 B. & C. 477, expressed his opinion that the debt could not be set off unless under statutes of set-off, or allegation of mutual credit, and consented to refer the matter to the Court (d). But this seems to have been an opinion on the specific effects of the law of bankruptcy, not on the right of trying counterclaims, and on the former point was in all probability quite correct. Where a counterclaim was for a breach of an agreement to repair, and was pleaded to an action for an aggravated assault, and for calling the plaintiff a number of violent and scandalous names, it was struck out, not being in any way connected with the plaintiff's claim (e). But in this case it seems to have been the quasi criminal nature of the action which guided, or perhaps misled, the judge; for when the assault is once reduced to a question of damages, there seems no good reason why cross damage accrued on the other side should not be set off against those damages.

P. sued S. for £1000, which he alleged he had been obliged to bring into settlement of which he was trustee and the defendant cestui que trust, in order to replace a similar sum secured by policies which the plaintiff, by an innocent breach of trust, had permitted to be withdrawn from the settlement, upon a joint and several covenant by the defendant and his father to indemnify him. The defendant S. delivered a defence and counterclaim, to which he made plaintiff P. and one E. S. defendants. He denied that the plaintiff had sustained any loss, or that any claim had been made on him, and insisted that the covenant to indemnify the plaintiff had been obtained by duress and was void; and by way of counterclaim he stated, first, that by the deed of indemnity his father had covenanted to indemnify him against his indemnity, and that P. and E. S. being executors of his father, must under the circumstances which he stated, be held to have admitted assets sufficient to satisfy the covenant of counter indemnity, and that the plaintiff P. ought to be held as having retained out of those assets the amount of his claim so as to extinguish it; and if assets had not been admitted by defendants to counterclaim, the plaintiff in it claimed a declaration that the counter-indemnity ought to be answered out of his father's estate, and that such estate ought to be administered for the purpose; and by way of further counterclaim S. stated that his father had, by a deed, appointed a sum of £10,000 to the defendant E. S. upon a secret trust to apply it in satisfaction of the liabilities of both his father and himself under the deed of indemnity, and

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[RULE III.]

Counterclaims
allowed to be
pleaded.

*Padwick v.
Scott.*

(a) *Evans v. Gann*, W. N. 1875, 199.

(b) *Newell v. National Provincial Bank of England*, 1 C. P. D. 496; 45 L. J. C. P. D. 285; 34 L. T. N. S. 533; 24 W. R. 458; see also *Atwood v. Miller*, *supra*.

(c) W. N. 1875, 228; 20 S. J. 97; see also *Anon.*, 20 S. J. 101, and two cases, W. N. 1875, 229.

(d) *Seligman v. Huth*, W. N. 1875, 249; 20 S. J. 139.

(e) *Lee v. Colyer*, W. N. 1876, 8; 20 S. J. 177.

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[RULE III.]

Separate
counterclaims
allowed to joint
action.

Qualification of
counterclaim.

he claimed performance of the trust. The plaintiff P. moved that these counterclaims should be excluded. The Vice-Chancellor ordered both to be struck out: the first on the ground that it could only be worked out on an admission of assets by the parties to it, or by administration of the father's estate, and that the action ought not to be stayed for this course; the other on the ground that it was so separate from the original cause of action, that to allow it to be mixed up with it would be an injustice to the plaintiff. Costs of plaintiff and original defendant to be costs in the action, the plaintiff to pay the costs of defendant to the counterclaim, and recover them from the defendant in the action (a). But where it seems right and fair to raise a counterclaim in the action, the Court will give every reasonable facility for its being so raised, and has done so, where an account was ordered against a mortgagee in possession, who was plaintiff in a foreclosure suit on a case made by the answer filed before the Acts came into force, though no counterclaim in form was made by the defendant (b).

To a joint action by two plaintiffs as joint lessees of a railway, the defendant pleaded two separate counterclaims, one against each of the plaintiffs, and it was held that in such case they were well pleaded (c). To an action for money due on contract, the defendant pleaded denying contract, and subsequently after defence becoming entitled to a balance under the contract against the plaintiff, obtained leave to amend his statement, and pleaded facts which showed him so entitled. The plaintiff replied that before action he had received no such sums as in plea shown. The defendant delivered no rejoinder, and plaintiff obtained order to sign judgment on defendant's counterclaim, on which order an appeal was heard. The Court of Appeal held that the defendant was entitled under this rule to judgment on his defence and counterclaim; but he ought to have pleaded it under O. XX., rr. 1—3 (which see), as arising after action commenced, and the plaintiff might then under O. XX., r. 3, have confessed the defence and signed judgment for costs up to defence pleaded. The plaintiff was therefore entitled to costs up to time when defence and counterclaim might have been properly pleaded, and to costs of appeal. Judgment was signed for want of rejoinder being regular, and an order was made that plaintiff repay to defendant balance on the counterclaim after deducting these costs (d). An application to file a counterclaim after issue joined and cause set down for hearing for the then present sittings was held too late and refused (e). It cannot be set up as such which does not seek relief against plaintiff (f). A counterclaim must be as specific as a statement of claim in a cross action, and one was held bad which was by a vendor against a liquidator in bankruptcy proceedings for specific performance of a contract to purchase a property, because it did not specify the agreement or the bankruptcy, or that the plaintiff was trustee in bankruptcy, and did not aver the adoption of the contract by the plaintiff as trustee in bankruptcy (g): it cannot rely on statements to be inferred from the pleadings of the other party not averred in the defendant's own.

(a) *Padwick v. Scott*, 2 Ch. D. 736; 45 L. J. Ch. D. 350; 24 W. R. 723.

(b) *Eyre v. Hughes*, 2 Ch. D. 148; 45 L. J. Ch. D. 395; 34 L. T. N. S. 211; 24 W. R. 597.

(c) *Manchester, Sheffield and Lincolnshire Railway Co. and London and N. W. Railway Co. v. Brookes*, 2 Ex. D. 243; 46 L. J. Ex. D. 244; 36 L. T. N. S. 103; 25 W. R. 413.

(d) *Ellis v. Munson*, W. N. 1876, 253; 35 L. T. N. S. 585.

(e) *Ware v. Gwynne*, W. N. 1875, 240; 20 S. J. 121.

(f) *Warner v. Twining*, 24 W. R. 536; *Furness v. Booth*, 4 Ch. D. 586; 46 L. J. Ch. D. 112; 25 W. R. 267.

(g) *Holloway v. York*, W. N. 1877, 112; 25 W. R. 627; see also *Crowe v. Barnicot*, W. N. 77, 178; 37 L. T. N. S. 68; 25 W. R. 789; *Breslauer v. Wilson*, 21 S. J. 789.

Specific performance of a liquidating debtor's contract will not be decreed against his trustee without the trustee's consent. See also on this rule *Shephard v. Beane* (a); *Street v. Gover* (b).

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4. Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary. Forms similar to those in Appendix (C) hereto may be used.

[RULE IV.]

Pleadings to contain merely statement of material facts.

Signature of counsel not needed.

This rule assimilates pleadings at law very nearly to what they have long been or ought to have been in equity, being, in fact, substantially the rule in Chancery, subject only to some slight particular modifications arising in particular circumstances, save, of course, that counsel's signature is dispensed with (c). It will, however, be seen on examining some of these cases that the construction of the rule is not by any means always easy: it is admitted that the essential facts should be averred and not the evidence of them, but a great deal of difficulty arises sometimes on what are the facts and what the evidence, *e.g.*, where the heirship of A. to B. is stated no doubt in one aspect, the material fact is that A. is heir-at-law to B.; but is this all that is to be stated, or is the condition of the family to be the matter alleged in the pleading, which may show that A. is elder brother of B., and that all B.'s issue and his father died in his lifetime? So where to a claim for eviction a defence of purchase for valuable consideration without notice is set up, is the reply to be a general averment of notice or a statement of the particular facts which give or gave the notice? It is submitted that, other than the special rules mentioned above as exceptions, as, for instance, the rule that no document or conversation could be used as a confession or admission of the other party unless set out or identified in the pleadings (d), the practice of the Court will probably be the same as to what facts must be pleaded as it was before in Chancery, and that all the old authorities will have the same weight as heretofore. As regards notice, see *post*, r. 26. But as to the general effect of this rule see *post*, r. 15, which may modify it considerably; r. 22 also may have a considerable bearing on its construction.

Assimilates pleadings at law to those in equity.

What are the material facts, and what the evidence?

Rules modifying former rule.

(a) *Ante*, p. 27; 2 Ch. D. 223; 45 L. J. Ch. D. 429; 24 W. R. 363; see *Harris v. Gamble*, W. N. 1877, 142; 21 S. J. 651.

(b) *Ante*, p. 28; 2 Q. B. D. 498; 46 L. J. Q. B. D. 582; 36 L. T. N. S. 766; 25 W. R. 750.

(c) See *Whaley v. Norton*, 1 Vern. 483; *Gordon v. Gordon*, 3 Sw. 472; *Clarke v. Turton*, 11 Ves. 240; *Williams v. Llewellyn*, 2 Y. & J. 68; *Hall v. Maltby*, 6 Pri. 240-259; *Montesquieu v. Sandys*, 18 Ves. 302; *Powis v. Marsfield*, 6 Sim. 565; *Smith v. Clarke*, 12 Ves. 477; *London and Birmingham Railway Co. v. Winter*, C. & Ph. 57; *Clark v. Periam*, 2 Atk. 333; *Blacker v. Phepoe*, 1 Mol. 354; *Fitzgerald v. O'Flaherty*, 1 Mol. 351; *Hughes v. Garner*, 2 Y. & C. 328; *Sidney v. Sidney*, 3 P. Wms. 269; *Lord Doneraile v. Lady Doneraile*, cited, 2 Atk. 338; *Wheeler v. Trotter*, 3 Sw. 174, n.

(d) *Houlditch v. Marquis of Donegal*, 1 Mol. 365; see *Graham v. Oliver*, 3 Beav. 124; *Whitley v. Martin*, 3 Bea. 226; *Hall v. Maltby*, 6 Pri. 240-260; *Mulholland v. Hendrick*, 1 Mol. 359; *Farrel v. —*, 1 Mol. 363.

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[RULE IV.]

Cases under
this rule.*Breslauer v.
Barwick.*

The following cases have been decided on the rule, and some of them may afford further information on the point just above noticed:—In the first place, statements scandalous and irrelevant ought not to appear in a pleading, and may be struck out if present (a). Paragraphs also which were held to be evidence were on application struck out as controverting this rule (b), and the Master having ordered an amendment of a statement of claim, averring money received by the defendant to the use of the plaintiff, by requiring particulars of the circumstances under which the money was received, the order was overruled with costs (c).

In the case of *Breslauer v. Barwick*, the plaintiff alleged that the defendant chartered to the plaintiff a steamer, the *German Emperor*, by charter-party dated the 27th Feb., 1875, which charter-party contained a clause that if either party failed to perform his part of the agreement he should pay to the other £750 liquidated damages without proof of mutual damage: that defendant had failed to perform, and claimed £750. Defendant pleaded that no such charter-party was ever entered into or executed by the parties: that the supposed charter-party was between Messrs. Barnett Brothers, and a company called the Tharsis Sulphur Company: that Barnett Brothers were not authorized to act as agents for the defendant, or if at all, only as the agents to make the charter-party in the usual form with plaintiff and not with the Tharsis Company, and that the charter-party sued on contained divers unusual and improper clauses, amongst others that declared on as the £750 liquidated damages. The plaintiff joined issue, and also replied that Barnett Brothers were the duly authorized agents of the defendant, and that through them the defendant agreed to charter the *German Emperor* to the plaintiff on the terms and conditions set out in the charter-party mentioned drawn for the purpose, but in drawing it one of the printed forms belonging to the Tharsis Sulphur Company, in which their name was printed as charterers, was through inadvertence of the plaintiff and the defendant used, and by the mutual mistake and oversight of the parties the name so printed as charterers was omitted to be struck out, and remained in the charter-party instead of the plaintiff's name. The plaintiff was not agent for the Tharsis Company in effecting the charter: the company was not intended to be, and was not, the charterer, nor in any way concerned in the business, and their name appears only in consequence of the before-mentioned mistake, and as representing the plaintiff's name. The charter-party, as drawn, was signed by the plaintiff in his own name as charterer, and by the defendants through their agents as owners of the *German Emperor*, and it was intended by, and agreed between, the plaintiff and the defendant that the plaintiff should be liable on, and entitled to the benefit of, the charter-party drawn as aforesaid. The defendant demurred to the reply as introducing a variance showing perhaps a case for reforming the deed, which he did not however ask to have reformed: that r. 2 required that he should state relief or remedy to which he claimed to be entitled. The Court stated that the facts set out in reply ought to have been set out in statement of claim, as they were material facts on which the plaintiff relied; that the defendant should therefore have joined issues on the statement of claim which would have compelled the plaintiffs to have amended. Instead of doing so, the defendant set up a colourable defence, which on this demurrer they must take to be an erroneous statement of facts. This, it appears, obliged the plaintiff to have recourse

(a) *Blake v. Albion Life Insurance Co.*, 45 L. J. C. P. D. 663; 35 L. T. N. S. 269; 24 W. R. 677.

(b) *Anon.*, 20 S. J. 102; *Jones v. Turner*, W. N. 1875, 239; *Askew v. N.-Eastern Railway Co.*, W. N. 1875, 238; 20 S. J. 120.

(c) *Bartlett v. Roche*, W. N. 1876, 54; 20 S. J. 280.

to the reply demurred to, which was in form a good reply. It was not needful that it should anywhere ask for a rectification of the charter-party (*Mostyn v. West Mostyn Coal and Iron Company*, 1 C. P. D. 145, 24 W. R. 401, *ante*, p. 24). The Court would treat it as rectified, and there was no need to go through the manual labour of striking the pen through the words erroneously inserted. When pleadings show that a contract was erroneously reduced into writing by mutual mistake, the Court will treat the writing as reformed, though the plaintiff has not asked for reformation. Demurrer overruled (*a*). The statement of claim in an action of libel set out a letter written by the defendant, which it charged as a libel on the plaintiff, adding innuendo as to the meaning of the words in the letter. The defence alleged that the statements in the letter were true. It was held by the Judge that this could not now be taken as a justification of the innuendo, but that it was still competent to disprove the innuendo (*b*). The power to order allegations to be struck out is discretionary, and any allegations which would not have been improper in a pleading before the Acts, may have their propriety dealt with on taxation of costs, and will not *prima facie* be struck out (*c*). This case, however, and some of the others above cited, will more properly come under notice in commenting on O. XXVII., r. 1.

After some doubt, it has been held that a special replication may be filed, and statement of claim need not be amended to anticipate defence by way of charge, and answer it (*d*). In *Wahlberg v. Young* it was held that inasmuch as the limitation of liability of shipowner under s. 54 of Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), is a ground of equitable defence, it is a material fact on which the party pleading relies, and as such ought to be set out on his defence (*e*). Though signature of counsel be not necessary, it is nevertheless desirable (*f*). As to conciseness of statement in pleading, see *Herring v. Bischoffsheim* (*g*).

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[RULE IV.]

Special
replications.

5. Every pleading which shall contain less than three folios of seventy-two words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed.

[RULE V.]

Pleadings of
three folios or
over must be
printed.

Amended by
Rule 5a.

The following rule is here inserted by rules of the Supreme Court, June, 1876:—

5A. In Order XIX., Rule 5, of "The Rules of the Supreme Court," the word "ten" is hereby substituted for the word "three" before the word "folios."

[RULE VA.]

(*a*) *Breslauer v. Barwick*, 24 W. R. 901 ; 20 S. J. 663 ; as to point of rectification, see *Mostyn v. West Mostyn Coal and Iron Co.*, 1 C. P. D. 145 ; 46 L. J. C. P. D. 401 ; 34 L. T. N. S. 325 ; 24 W. R. 401. As to reply or amending statement of claim see *Earp v. Henderson*, 3 Ch. D. 254 ; 45 L. J. Ch. D. 738 ; 24 W. R. 774 ; *Hall v. Eve*, 4 Ch. D. 341 ; 46 L. J. Ch. D. 145 ; 35 L. T. N. S. 926 ; 25 W. R. 177.

(*b*) *Payne v. Coathupe*, 20 S. J. 724.

(*c*) *Watson v. Rodwell*, 3 Ch. D. 380 ; 45 L. J. Ch. D. 744 ; 35 L. T. N. S. 86 ; 24 W. R. 1009.

(*d*) *Hall v. Eve*, 4 Ch. D. 341 ; 46 L. J. Ch. D. 145 ; 25 W. R. 177 ; see *Earp v. Henderson*, 3 Ch. D. 254 ; 45 L. J. Ch. D. 738 ; 34 L. T. N. S. 844 ; *Breslauer v. Barwick*, 24 W. R. 901 ; 20 S. J. 663.

(*e*) 45 L. J. C. P. D. 783 ; 24 W. R. 847 ; 20 S. J. 542.

(*f*) *Bernard v. Hardwick*, W. N. 1876, 134 ; *Duckitt v. Jones*, 33 L. T. N. S. 777.

(*g*) W. N. 1876, 77.

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[RULE VA.]

[RULE VI.]

How docu-
ments to be
delivered.

It had been held before the amendment of r. 5, that pleadings of more than three folios might by leave be filed without printing, and it seems not only might, but would be ordered so to be if only a few copies were likely to be wanted (a).

6. Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer.

This rule does away with filing pleadings in the first instance in every case except where there is no appearance.

In an action for redemption and foreclosure the defendant mortgagors not having appeared, the plaintiff was proceeding under O. XIII., r. 9, and had under this rule filed at the office of the Record and Writ Clerks an affidavit of the service of the writ, the statement of claim, the notice of motion, the affidavit in support of it, and a notice of filing the affidavit. It was held that the proper course had been followed (a). In *Cook v. Dey*, *infra* (b), Hall, V.-C., considered that this rule was not applicable to notices of motion, but the Master of the Rolls in *Dymonds v. Croft* (c), held that a notice of motion was a document required to be delivered to a party, and within the provisions of this rule. But it has also been held that filing under this rule is not necessary where personal service has been made under O. LIII., r. 7 (d), nor is a notice of motion for judgment a document to be delivered where defendant has not appeared, and the writ has been filed with the proper officer (e). See on this rule, *Menton v. Metcalf*, before cited (f).

In an action for partition and ejectment against several defendants, all had put in defences except H., who had not entered an appearance. The statements of defence contained admissions which entitled the plaintiff to move for an order for sale. Plaintiff moved under O. XL., r. 11, and O. XXIX., r. 10, against the defendants who had appeared, and against H., respectively, for a partition order, and notice of motion was served on H. under this rule, O. XIX., r. 6, by filing it with the officer. By some mistake the notice of motion for the 15th March was not filed till the 13th, not leaving two clear days before the hearing. Held that the motion could be made under the two orders, but under the circumstances must stand over for next motion day, and the notice of motion must be amended by substituting the 22nd March for the 15th; a fresh notice must be filed with the officer, and the action set down on motion for judgment against H. alone (g). On this rule also, see *Holloway v. York*, cited on rule 3 (h).

(a) *Anon.*, W. N. 1875, 218; 20 S. J. 80.

(b) *Shepherd v. Beane*, W. N. 1876, 61; see *Harris v. Gamble*, W. N. 1877, 142; 21 S. J. 651; see also *Cook v. Dey*, 2 Ch. D. 218; 45 L. J. Ch. D. 611; 24 W. R. 362; see also 20 S. J. 411 as to delivery of notice of trial.

(c) 3 Ch. D. 512; 45 L. J. Ch. D. 612; 35 L. T. N. S. 27; 24 W. R. 700, 842; see also *Morton v. Miller*, 3 Ch. D. 516; 45 L. J. Ch. D. 613; 24 W. R. 723; *Gardiner v. Hardy*, W. N. 1876, 185.

(d) *Whitaker v. Thurston*, W. N. 1876, 232.

(e) *Williams v. Cardwell*, W. N. 1877, 140; 25 W. R. 646.

(f) *Ante*, p. 216; W. N. 1877, 142; 46 L. J. Ch. D. 584; 36 L. T. N. S. 683; 21 S. J. 609.

(g) *Parsons v. Harris*, 25 W. R. 410; W. N. 1877, 76.

(h) *Ante*, p. 256; W. N. 1877, 112; 25 W. R. 627.

7. Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, and with the reference to the letter and number of the action, the Division to which and the Judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor.

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[RULE VII.]

Pleadings to be
delivered and
marked.

8. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his statement of defence. If the plaintiff's claim be for discovery only, the statement of claim shall show it.

[RULE VIII.]

Statement of
claim and of
counter-claim.

A claim for discovery alone can hardly be anticipated now, and indeed has been hardly known since the Common Law Courts acquired power of giving discovery as discussed in Notes to O. XXXI., rr. 2, 9, 11, and 14.

However, a proceeding is reported in one case of the kind as follows : A summons was taken out by the defendant in an action for discovery to set aside statement of claim as not showing that it was brought by persons for objects or under circumstances entitling them to bring it. The statement of claim stated facts of dispute, which was as to water rights, that the matter had been referred to arbitration, and concluded that the plaintiffs were unable to obtain evidence of the matters mentioned in the interrogatories, and that the defendant had refused to give them information thereupon. Quain, J., is reported to have said : " I do not see the object of this statement of claim. Mr. Starkie (the person from whom discovery was sought) has made himself a party to the reference, and might have been joined as a party to the action if you had applied to continue proceedings under the Judicature Acts for the purpose. In Equity, if discovery was wanted from some one who was not a party to the action, he was made a defendant. I will adjourn to see if the reference is carried out " (a). See on this rule also, *Holloway v. York* (b).

9. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts.

[RULE IX.]

Distinct claims
to be distinctly
stated.
Same as to
defences.

(a) *Ainsworth v. Starkie*, W. N. 1876, 8 ; 20 S. J. 162.

(b) *Ante*, p. 256; W. N. 1877, 112 ; 25 W. R. 627.

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[RULE X.]

When defendant relies on facts as supporting set-off or counter-claim he must state so.

10. Where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counter-claim.

Where a defendant in his statement of defence and counterclaim neglected to comply with this rule, it was held sufficient for the plaintiff, who wished to put in issue the facts alleged by the defendant, to join issue generally under r. 21, as in such case r. 20 did not apply to his reply (a). See on this rule *Child v. Stenning* (b). See also notes on r. 3, ante, pp. 254 et seq.

[RULE XI.]

Party wishing to deny the right of another to claim as executor, &c., shall deny it specifically.

11. If either party wishes to deny the right of any other party to claim as executor, or as trustee whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically.

[RULE XII.]

In probate if plaintiff deny defendant's interest he must state so.

12. In Probate actions where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest.

Where the statement of claim failed to deny defendant's interest, the Court refused to order the statement of defence to be struck out for failure to allege it (c).

[RULE XIII.]

13. No plea or defence shall be pleaded in abatement.

[RULE XIV.]

New assignment abolished. But statement of claim to be amended.

14. No new assignment shall hereafter be necessary or used. But everything which has heretofore been alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim.

See *Earp v. Henderson* (d), *Hall v. Eve* (e).

This alters the form somewhat, but really makes no alteration in substance.

[RULE XV.]

Defendant in possession in an action for recovery of land.

15. No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or

(a) *Hillman v. Mayhew*, 24 W. R. 485 ; see also *Rolfe v. McLaren*, post, p. 264 ; 3 Ch. D. 106 ; 24 W. R. 816.

(b) *Ante*, p. 225 ; 5 Ch. D. 695 ; 46 L. J. Ch. D. 523 ; 36 L. T. N. S. 426 ; 25 W. R. 519.

(c) *Metcalf v. James*, 25 W. R. 63 ; 21 S. J. 48.

(d) 3 Ch. D. 254 ; 45 L. J. Ch. D. 738 ; 34 L. T. N. S. 844 ; 24 W. R. 774.

(e) *Ante*, p. 259 ; 4 Ch. D. 341 ; 46 L. J. Ch. D. 145 ; 35 L. T. N. S. 735, 926 ; 25 W. R. 177.

right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases herein-before mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as herein-before mentioned.

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[RULE XV.]

In *Magdalen Hospital v. Knotts* (a), plaintiff moved for common order that defendants should file affidavit of documents in their possession relating to matters in question in the action. Defendants resisted on the ground that he was in possession in action for recovery of land, and setting up this rule, Fry, J., said, no injury would be done by the order, for defendants could still object to produce documents or to their admissibility in evidence. See O. XXXI., rr. 11 and 12.

In *Fortescue v. Fortescue* (b), the defendant was in possession of real estate to which the plaintiff claimed to be entitled as heir-at-law of his mother. The plaintiff filed his bill for discovery and production of documents in support of the defendant's title. With her answer the defendant filed an affidavit in support of her title, to which she appended a list of documents, and among them was "a bundle of deeds and papers relating exclusively to the title of me, the above-named defendant, to the premises mentioned and referred to in the plaintiff's bill," it was held that this was not a sufficient description, although the defendant swore the documents in question would not tend to help the plaintiff's case.

16. Nothing in these rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead he shall not plead any other defence without the leave of the Court or the Judge.

[RULE XVI.]

Not guilty by
statute
retained.

If pleaded, no
other plea to
be pleaded, but
by leave.

This rule is introduced apparently because such a plea as not guilty by statute might otherwise seem to be a breach of r. 1 of this Order, and yet might be the most convenient for raising the defence relied on.

17. Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

[RULE XVII.]

Allegation of
fact not denied
admitted, ex-
cept where
party under
disability.

It is presumed that the admission here referred to will be carried no further than the necessity of the rule demands, that is to say, that matters not denied, &c., will be taken as admitted for the purposes of the action, but not extra the action, but with this restriction it does not seem clear why the exception of infants, lunatics, or persons of unsound mind, is

(a) 21 S. J. 610.

(b) 34 L. T. N. S. 847 ; 24 W. R. 945.

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[RULE XVII.]

made; the fact of their exception, will tend to increase the cost of all actions in which any of them is engaged, for every matter, however simple and undoubted, will have to be strictly proved.

In an action against husband and wife on joint and several promissory notes, statement of defence had been delivered, which, purporting to be defence of both defendants, raised no defence as regarded the husband. Under **O. XL., r. 11**, judgment was entered against the husband on an affidavit of service of notice of motion (a). This rule, however, applies only to pleadings themselves delivered under the Judicature Acts, and has no retroactive effect where suit was commenced and pleadings filed under the old practice, though issue joined under the new (b). To an action for account of rents and profits a plea was put in of counterclaim of a sum due under an award. The plaintiff joined issue generally. The defendant moved that the facts stated in the counterclaim must, under this and subsequent rules 18, 19, and 20, be taken to be admitted, and that under **O. XL., r. 11**, and **O. XXXIII.** (which see), he was entitled to an account of what was due, or in the alternative that reply might be struck out or amended under **O. XXVII., r. 1**, and **O. LIX.** (which see). Held that order for an account could not be made on the counterclaim without going into the particulars of the plaintiff's claim; the balance mentioned in **O. XXII., r. 10** (which see) being balance at the hearing of action, and that reply could not be struck out or amended (c). Upon this rule also see cases noted on **r. 22, post**, pp. 266, 267.

[RULE XVIII.]

Each party to
allege all facts
not already
appearing on
which he in-
tends to rely.

18. Each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as for instance, fraud, or that any claim has been barred by the Statute of Limitations or has been released.

In *Wakelee v. Davis* (d), part of the statement of claim was demurred to, it showed that the plaintiff's claim was barred by the Statute of Limitations; it was held that the cause of action remained, although the remedy might be suspended; the defendant might not plead the statute. By means of a demurrer the issue whether the statute applies or not is not raised.

On this rule, see the case of *Rolfe v. McLaren* (e).

[RULE XIX.]

Pleadings to

19. No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim

(a) *Jenkins v. Davies*, 1 Ch. D. 696; 24 W. R. 690; see *Lord Hanmer v. Flight*, 35 L. T. N. S. 127; 24 W. R. 346; on appeal, 36 L. T. N. S. 219, ante, p. 221, and notes on **O. XL., r. 11, post**; but see also *Hillman v. Mayhew*, 24 W. R. 485, ante, p. 262.

(b) *Tucker v. Swinburne*, 20 S. J. 451.

(c) *Rolfe v. McLaren*, 3 Ch. D. 106; 24 W. R. 816.

(d) 25 W. R. 60.

(e) 3 Ch. D. 106; 24 W. R. 816.

or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

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[RULE XIX.]

See on this rule, *Rolfe v. McLaren (a)*, *Hall v. Eve (b)*, *Breslauer v. Barwick (c)*, *Earp v. Henderson (d)*.

contain no
inconsistent
claims or
allegations.

[RULE XX.]

General denials
not sufficient.

20. It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth.

There can be no manner of doubt that this rule will be of most important effect if fully carried out by the Court, but we anticipate that if enforced it would give rise to a general form of answer, &c., in which each fact averred would be referred to with a statement that the party pleading did not admit its truth except in a comparatively small average of cases. This rule is, however, expressly confined to facts alleged in statement of claim or in counterclaim, for if the subsequent pleading joins issue, all the facts in the prior pleading on the other side are held to be denied unless any be specially excepted.

Where a defendant in his statement of defence and counter-claim does not comply with O. XIX., r. 10, it is sufficient for the plaintiff who wishes to put in issue the facts alleged by the defendant, to join issue under the next rule, as in such case the rule now under consideration will not apply to the reply of the plaintiff (e).

See on this rule, *Rolfe v. McLaren (a)*, *Hall v. Eve (b)*, and cases cited on r. 22, *post*.

21. Subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.

[RULE XXI.]

Joinder of
issue.

This rule seems to contemplate further stages of pleading than a reply, but there is no provision made for anything further; the second rule of this order seems to limit pleadings to statement of complaint and claim of relief, statement of defence, set-off, or counterclaim and reply, and to go

(a) 3 Ch. D. 106; 24 W. R. 816, *ante, supra*.

(b) 4 Ch. D. 341; 46 L. J. Ch. D. 145; 35 L. T. N. S. 735, 926; 25 W. R. 177, *ante*, p. 259.

(c) 24 W. R. 901; 20 S. J. 663, *ante*, pp. 258-259.

(d) 3 Ch. D. 254; 45 L. J. Ch. D. 738; 34 L. T. N. S. 844, *ante*, p. 259.

(e) *Hillman v. Mayhew*, 24 W. R. 485, *ante*, p. 262.

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[RULE XXI.]

no further ; but there is nothing in the Act or Rules distinctly forbidding any further steps in pleading. See *post*, O. XXIV., r. 2, which makes distinct provision for further pleadings by leave.

In *Hall v. Eve* (a), it was held that a reply should be specific where a specific statement of fact was wanting to rebut the defence, and that statement of claim need not be amended in order to anticipate the defence and answer it by way of charge, thus in some points appearing to overrule the decisions in *Earp v. Henderson* (b), and *London and St. Katharine's Dock Co. v. Metropolitan Railway Co.* (c).

[RULE XXII.]

Party denying
allegation of
his adversary
must do so
expressly and
particularly.

22. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.

It cannot be denied that this rule is fair and reasonable, but how is it to be enforced ? It is supposed by a motion or summons praying that the evasive pleading may be struck out or amended, that is, that it may be struck out unless the offending party shall amend it correctly in a proper time.

Thorp v.
Holdsworth.

Another method applicable in some cases is suggested by the following case. In an action for dissolution of partnership the plaintiffs delivered a statement of claim, in which they alleged that they and the defendant, in August, 1875, had agreed to take a lease of a brickfield and other property, and to carry on in partnership the business of brickmakers. That they and the defendant procured a lease of the premises, and that draft articles of partnership, containing provisions mentioned in statement of claim, were considered and approved of by the plaintiffs and the defendant on the 17th Sept., subject to final revision by the defendant's solicitor, and soon after that it was agreed that sums to be brought in by the plaintiff Thorp and the defendant should be £1,000 each. That the draft articles had not been finally settled, but the plaintiffs and the defendant had proceeded with the partnership undertaking, and that the defendant had taken an active part in proceeding, but had never contributed his share, and that notice had been given him to withdraw from the undertaking. The plaintiffs claimed that it might be declared that they were co-partners on the terms agreed on, and that the partnership might be dissolved. The defendant, by statement of defence, admitted that he agreed to enter into partnership, and to take a lease as alleged, but as to the interview on the 17th Sept., denied that the terms of arrangement were then definitely agreed on as alleged. The plaintiffs moved for an order in accordance with the statement of claim, contending that the defendant's denial was

(a) 4 Ch. D. 341 ; 46 L. J. Ch. D. 145 ; 35 L. T. N. S. 926 ; 25 W. R. 177.

(b) 3 Ch. D. 254 ; 45 L. J. Ch. D. 738 ; 34 L. T. N. S. 844 ; 24 W. R. 774.

(c) W. N. 1876, 272 ; 35 L. T. N. S. 733.

evasive. The Master of the Rolls held that the defendant's statement contained no specific denial, and was evasive within the meaning of the rule, and ordered dissolution, with usual accounts and inquiries (a).

A useful commentary on these rules is contained in another report, apparently of the same judgment of the Master of the Rolls, as follows (c). He is reported to have said: "I intend to construe r. 22 of O. XIX. strictly; the meaning of the rules of O. XIX. is to prevent the issue being too much at large and to bring the parties to a definite issue; O. XL., r. 11, enables the plaintiff or the defendant to get rid of so much of the subject matter of the action as is not in dispute, by taking an order on the admission of fact upon the pleadings: what admissions are is defined by O. XIX., r. 17, which requires specific denial or refusal to admit; consequently, where there is no specific denial or refusal to admit, there is an admission. Thus r. 20 shows what specific denial or specific refusal to admit is, and that there may be no mistake, r. 22 is added to explain how a denial must not be made. . . . The defendant is bound, if he intends to deny that any agreement whatever was come to between him and the plaintiff, to do so specifically, or if he does not mean that, then he must deny that there was any agreement except such as he sets forth. The result of the present rules is similar to the rule existing in Chancery before the orders of Aug., 1841, when the defendant had to answer the substance of the bill whether specifically interrogated thereon, or not. It is said that this will be a hardship on the defendant in obliging him to discover his points of defence; but this is the very object of the rules of pleading, otherwise there might be an agreement containing fifty stipulations, and if the defendant were allowed to deny the agreement generally, the plaintiff might have to come into Court prepared with fifty different witnesses to prove the fifty different stipulations, whilst the defendant was only prepared to dispute one of the fifty. What would be said of a system of pleading under which such a state of things was possible?" (b)

A statement of defence containing a general denial of fact consistent with several issues and an allegation raising specifically one issue: it was held that the only issue open to the defendant at the trial was the one specifically raised, and leave to amend was refused (c).

23. When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.

This rule sets aside a rule which seems to have been established by several cases, that non-compliance with the Statute of Frauds might be set up under the general issue, denying the contract (d); indeed, in one case, it was held that a special plea to the effect that the contract declared on was within the Statute of Frauds, and was not in writing, was held bad on special demurrer as an argumentative traverse (e). It had, however, been held that illegality of the contract could not be set up under

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[RULE XXII.]

[RULE XXIII.]

Denial of alleged contract confined to denial of execution allows no question of legality of contract.

Former rule.

(a) *Thorp v. Holdsworth*, 3 Ch. D. 637; 45 L. J. Ch. D. 406.

(b) *Anon.*, 20 S. J. 468.

(c) *Byrd v. Nunn*, 5 Ch. D. 781; 37 L. T. N. S. 90; 25 W. R. 749.

(d) *Buttemere v. Hayes*, 5 M. & W. 456; *Eastwood v. Kenyon*, 11 A. & E. 438; *Frisker v. Thomlinson*, 1 M. & G. 772.

(e) *Leaf v. Tuton*, 10 M. & W. 393.

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[RULE XXIII.]

the general issue, but must be specially pleaded (*a*) ; in like manner, that alteration of the instrument after execution, by striking out a party co-contracting with the defendant (*b*), must have been specially pleaded, so that as to illegality generally the law is not changed, as would seem, but only the pleading as to the Statute of Frauds is altered.

But in *Clarke v. Callow*, it was much doubted whether a defence under the Statute of Frauds could or could not be raised, the plaintiff alleging delivery and acceptance of goods sold and delivered, and the defendant traversing these allegations ; the point was, however, not then decided (*c*). It was, however, subsequently decided that, not having been specifically pleaded, the point could not be raised (*d*), and it has been held that this statute cannot be raised on demurrer (*e*), and it has since been held that the Statute of Limitations cannot be raised on demurrer, though the statement of claim showed the claim barred by the statute (*f*), but it would seem that in this case no authorities were cited, and at least at the Chancery side the point had been well settled the other way (*g*).

[RULE XXIV.]

Sufficient to
aver effect of
document.

24. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material.

[RULE XXV.]

When material
to aver malice,
&c., sufficient
to aver it
generally.

25. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Particular facts, amounting to a clear charge of fraud, were alleged against a defendant, but technically there was no distinct charge in terms of fraud made against him, and he demurred. The demurrer was allowed but costs reserved, the Court intimating an opinion that the defendant would not get his costs of demurrer on the ground of a mere accidental deficiency in pleading, when it was practically such as any man of common sense would understand. In this case it seems it would have been sufficient under this rule to have averred the fraud generally without stating the particular facts, and would have avoided the difficulty (*h*).

(*a*) *Martin v. Smith*, 4 Bing. N. C. 436 ; *Fenwick v. Laycock*, 1 Q. B. 414 ; *Potts v. Sparrow*, 1 Bing. N. C. 594 ; *Allport v. Nutt*, 1 C. B. 974. See also, as connected with this subject, *Edwards v. Brown*, 1 C. & J. 307, where non est factum pleaded, went only to the fact of execution, not to the construction of the deed.

(*b*) *Mason v. Bradley*, 11 M. & W. 590.

(*c*) 20 S. J. 744.

(*d*) 46 L. J. Q. B. D. 53 ; W. N. 1876, 262.

(*e*) *Catling v. King*, 5 Ch. D. 660 ; 46 L. J. Ch. D. 384 ; 36 L. T. N. S. 526 ; 25 W. R. 550.

(*f*) *Wakelee v. Davis*, 25 W. R. 60.

(*g*) *Saunders v. Hord*, 1 Ch. Rep. 184 ; *Jenner v. Tracey*, 3 P. Wms. 287, n. ; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, 637 ; *Foster v. Hodgson*, 19 Ves. 180 ; *Hoare v. Peck*, 6 Sim. 51 ; *Bampton v. Birchall*, 5 Beav. 67, 76 ; *Prance v. Simpson*, Kay, 678, 680 ; *Smith v. Fox*, 6 Ha. 386, 391 ; *Rolfe v. Gregory*, 8 Jur. N. S. 606 ; 10 W. R. 711.

(*h*) *Hodges v. Hodges*, 2 Ch. D. 112 ; 45 L. J. Ch. D. 750 ; 24 W. R. 293.

26. Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material.

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[RULE XXVI.]

This rule settles the question whether, when purchase for value without notice is set up, notice should be generally or specially averred in reply; this rule shows that a general averment will, as formerly, suffice, and will let in evidence of the specific facts which tend to the conclusion of notice; indeed, this rule seems only a specific case of the one immediately foregoing, but this difference is introduced from the foregoing rule, that when the form or the precise terms of the notice are material, then they should be specially pleaded.

When material to aver notice, sufficient to aver it generally, unless the form be material.

27. Wherever any contract or any relation between any persons does not arise from an express agreement, but is to be implied from a series of letters and conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

[RULE
XXVII.]

Where relation between parties arises from series of letters, &c.

This introduces great convenience in pleading a complicated dealing, as to which it may often be very difficult to arrive at a clear conclusion of what the specific relation arising out of it may be. The old rule was that pleadings could not be hypothetic or alternative (*a*), and it was frequently very difficult and inconvenient to conform to this rule. The new rule will, however, have to be watched carefully, and will require to be dealt with by the Judges freely, in cases which may often arise of alternative pleading, embarrassing the opponent so as to leave him in doubt to what he is to direct his proof, in which case it is presumed the Judges will order such a pleading to be made more specific and distinct.

Caution as to rule.

It may be observed that it has already been held that alternative claims for inconsistent relief are as bad under the new practice as formerly (*b*).

28. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

[RULE
XXVIII.]

No allegation required of matter presumed in law unless first denied.

(*a*) *Griffiths v. Eyles*, 1 B. & P. 413; *The King v. Brereton*, 8 Mod. 330; *Margetts v. Bays*, 4 Ad. & El. 489.

(*b*) *Evans v. Buck*, 4 Ch. D. 432; 46 L. J. Ch. D. 157; 25 W. R. 392; *Child v. Stenning*, 5 Ch. D. 695; 46 L. J. Ch. D. 523; 36 L. T. N. S. 426; 25 W. R. 519.

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[RULE
XXVIII.]

[RULE XXIX.]

Where action
proceeds in
district re-
gistry.

[RULE XXX.]

In actions for
collision in
Admiralty,
Preliminary
Acts to be
filed before
pleadings
delivered.

Preliminary
Act.

Pleadings may
be waived by
consent.

[*E. g.*—Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.]

29. Where an action proceeds in a district registry all pleadings and other documents required to be filed shall be filed in the district registry.

30. In actions for damage by collision between vessels, unless the Court or a Judge shall otherwise order, each solicitor shall, before any pleading is delivered, file with the proper officer a document to be called a Preliminary Act, which shall be sealed up and shall not be opened until ordered by the Court or a Judge, and which shall contain a statement of the following particulars :—

(a.) The names of the vessels which came into collision and the names of their masters.

(b.) The time of the collision.

(c.) The place of the collision.

(d.) The direction of the wind.

(e.) The state of the weather.

(f.) The state and force of the tide.

(g.) The course and speed of the vessel when the other was first seen.

(h.) The lights, if any, carried by her.

(i.) The distance and bearing of the other vessel when first seen.

(k.) The lights, if any, of the other vessel which were first seen.

(l.) Whether any lights of the other vessel, other than those first seen, came into view before the collision.

(m.) What measures were taken, and when, to avoid the collision.

(n.) The parts of each vessel which first came into contact.

If both solicitors consent, the Court or a Judge may order the preliminary acts to be opened and the evidence to be taken thereon without its being necessary to deliver any pleadings.

Plaintiffs, in an action instituted by owners of cargo laden on board the *A.* against owners of the *A.* to recover for damage sustained by such

cargo in consequence of a collision between the *A.* and the *B.*, took out a summons, calling on the defendants to show cause why an order should not be made with reference to the filing of preliminary acts in such action. The Court ruled that in such a case, as the order could not be mutual, no preliminary act need be delivered (*a*).

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COURT.

Ord. 19.

[RULE XXX.]

ORDER XX.

Ord. 20.

PLEADING MATTERS ARISING PENDING THE ACTION.

1. Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply.

[RULE I.]

Ground of defence arising after action brought, but before delivery of defence, may be pleaded. Defence to set-off or counter-claim arising after delivery thereof may be pleaded in reply.

This alters in a very considerable degree the old rule as to pleas *puis darrein continuance*, or pleas to the further maintenance of the action, which were always in substitution for the former pleas, if any, on which, after the filing of the plea *puis darrein continuance* or to the further maintenance of the action, no further proceeding could be had. See on this rule the case already cited of *Ellis v. Munson* (*b*), and *Original Hartlepool Collieries Co. v. Gibbs* (*c*).

2. Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, and by leave of the Court or a Judge, deliver a further defence or further reply, as the case may be, setting forth the same.

[RULE II.]

Eight days allowed for delivery of further defence or reply after statement of defence or reply where new defence to action or set-off or counter-claim has arisen.

On this rule also, see *Ellis v. Munson* (*b*).

3. Whenever any defendant, in his statement of defence, or in any further statement of defence as in the last rule

[RULE III.]

Where defendant shows

(*a*) *The John Boyne*, 36 L. T. N. S. 29; 25 W. R. 756.

(*b*) W. N. 1876, 253; 35 L. T. N. S. 585; *ante*, p. 256.

(*c*) 5 Ch. D. 713; 46 L. J. Ch. D. 311; 36 L. T. N. S. 433.

RULES OF COURT.

Ord. 20.

[RULE III.]

defence arisen since action brought, plaintiff may confess and claim costs.

mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence, which confession may be in the Form No. 2 in Appendix (B.) hereto, with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the pleading of such defence unless the Court or a Judge shall, either before or after the delivery of such confession, otherwise order.

This practice resembles that under R. G. H., 1853 (Pl.), r. 22. See on this rule also, *Ellis v. Munson* (a).

Pleading a counterclaim due before action brought has been held analogous to pleading a defence arising after action brought, and to come within this rule plaintiff was therefore given a week after the counterclaim set up to consider whether he would stay or proceed with his action (b). Plea of bankruptcy of the plaintiff after action brought is in the nature of a plea *puis darrein continuance*, and, when confessed by plaintiff, operates as an avoidance of all other defences, so as to entitle the plaintiff to his costs up to the time of plea pleaded (c).

Ord. 21.**ORDER XXI.****STATEMENT OF CLAIM.**

[RULE I.]

If defendant do not state that he requires statement of claim, when plaintiff may deliver it.

Plaintiff may at any time after issue of writ deliver statement with writ or notice in lieu of writ,

but not after six weeks from appearance unless by leave.

1. Subject to Rules 2 and 3 of this Order, the delivery of statements of claim shall be regulated as follows:—

(a.) If the defendant shall not state that he does not require the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver it within six weeks from the time of the defendant's entering his appearance.

(b.) The plaintiff may, if he think fit, at any time after the issue of the writ of summons, deliver a statement of claim, with the writ of summons or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim: Provided that in no case where a defendant has appeared shall a statement be delivered more than six weeks after the appearance has been entered unless otherwise ordered by the Court or a Judge.

(a) W. N. 1876, 253; 35 L. T. N. S. 585, *ante*, p. 256.

(b) *Cappeleus v. Brown*, W. N. 1875, 229, 231; 20 S. J. 98.

(c) *Foster v. Gamgee*, 1 Q. B. D. 666; 45 L. J. Q. B. D. 576; 34 L. T. N. S. 248; 24 W. R. 319.

(c.) Where a plaintiff delivers a statement of claim without being required to do so, the Court or a Judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper.

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COURT.

Ord. 21.

[RULE I.]

Plaintiff delivering statement without being required, may be ordered to pay the costs.

It has been already remarked, see notes to O. III., r. 2, *ante*, p. 169, that particulars of demand seem to have been kept alive in some cases, though no rule seems to provide for them. In an action of slander, the defendant applied for the names and addresses of persons mentioned in the statement of claim, and in what respects the plaintiff's business was falling off. Both questions were disallowed (a).

In all short causes it has been said the defendant should state that he does not require statement of claim (b), but on this matter see *ante*, p. 253, notes on O. XIX., r. 2.

On an application in a case under this rule to dismiss for want of prosecution with costs under O. XXIX., r. 1, the old order to speed the cause was made on the application of the plaintiff, but it was stated that such order was not to be a general one (c).

2. In Probate actions the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited for his appearance, in case he has made default; but where the defendant has appeared, the plaintiff shall not be compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit as to scripts.

[RULE II.]

In Probate, time for plaintiff to deliver statement.

By this rule the plaintiff is, within six weeks from the entry of appearance, to deliver his statement of claim, but need not do so until eight days after filing of affidavit of scripts. Suppose affidavit of scripts not filed till seven weeks after appearance, when is statement of claim to be delivered of necessity? The rule is obscurely drawn, and would have been more intelligible had it been framed with an exception. It is submitted that the intention is that in every case, except that where a defendant has appeared but has not filed his affidavit of scripts in time, the statement shall be delivered within six weeks from the entry of appearance or the time limited for such entry, and in the excepted case at latest within eight days from the filing of the affidavit of scripts.

Probable meaning of rule.

3. In Admiralty actions in rem the plaintiff shall, within twelve days from the appearance of the defendant, deliver his statement of claim.

[RULE III.]

In Admiralty actions in rem statement of claim to be delivered within twelve days from appearance.

(a) *Wingard v. Cox*, W. N. 1876, 106; 20 S. J. 341.

(b) *Taylor v. Duckett*, W. N. 1875, 193; see also *Breton v. Mockett*, W. N. 1875, 255; 33 L. T. N. S. 684; *Boyes v. Cook*, W. N. 1876, 28; 33 L. T. N. S. 778.

(c) *Higginbottom v. Aynsley*, 3 Ch. D. 288; 24 W. R. 782.

RULES OF
COURT.**Ord. 21.**

[RULE IV.]

Where writ specially indorsed, plaintiff to deliver as statement of claim a notice stating that claim is indorsed on writ.

4. Where the writ is specially indorsed, and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the Court or a Judge shall order him to deliver a further statement. Such notice may be either written or printed, or partly written and partly printed, and may be in the Form No. 3 in Appendix (B.) hereto, and shall be marked on the face in the same manner as is required in the case of an ordinary statement of claim. And when the plaintiff is ordered to deliver such further statement it shall be delivered within such time as by such order shall be directed, and if no time be so limited then within the time prescribed by Rule 1 of this Order.

Under this rule an order was made in a case of *Cotton v. Housman (a)*, that the plaintiff should deliver the best particulars of claim she could within a week, the defendant to have eight days after delivery to put in statement of defence. And it seems that, notwithstanding the notice mentioned in the rule, an order may nevertheless be made on the plaintiff to deliver a statement of claim (b).

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ORDER XXII.

DEFENCE.

[RULE I.]

Time for defendant to deliver statement of defence.

1. Where a statement of claim is delivered to a defendant he shall deliver his defence within eight days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a Judge.

As to enlargement of time, see further, O. LVII., r. 6.

Extended time given to a defendant under this rule for delivery of his defence entitles him to demur only within such time if he please so to do, notwithstanding O. XXVIII., referring especially to demurrer, and especially O. XXVIII., r. 4, contrasting demurrer and defence. If it be intended to deprive him of any extension of time for demurrer, it should be specially excluded in the order (c).

[RULE II.]

Time when defendant not requiring nor receiving statement of claim, may deliver defence.

2. A defendant who has appeared in an action and stated that he does not require the delivery of a statement of claim, and to whom a statement of claim is not delivered, may deliver a defence at any time within eight days after his

(a) W. N. 1876, 22 ; 20 S. J. 240.

(b) *Schomberg v. Zoebelli*, W. N. 1876, 106 ; 20 S. J. 341 ; but see *Atkins v. Taylor*, W. N. 1876, 11 ; 20 S. J. 218.

(c) *Hodges v. Hodges*, 2 Ch. D. 112 ; 45 L. J. Ch. D. 750 ; 24 W. R. 293.

appearance, unless such time is extended by the Court or a Judge.

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COURT.

Ord. 22.

[RULE III.]

3. Where leave has been given to a defendant to defend under Order 14, Rule 1, he shall deliver his defence, if any, within such time as shall be limited by the order giving him leave to defend, or if no time is thereby limited, then within eight days after the order.

Where defendant has leave to defend, to deliver defence within eight days after order.

Although no statement of claim has been put in where the writ is specially endorsed, the defendant must deliver his defence or in default of it judgment may be signed under **O. XXIX., r. 2 (a)**. We are informed that in the Queen's Bench and Exchequer Divisions it is now the practice, in consequence of the cases above referred to, on dismissal of a summons for judgment under **O. XIV., r. 1**, to give leave to file statement of defence within eight days after statement of claim has been filed, but in the Common Pleas Division no such order is made, unless specially asked for.

4. Where the Court or a Judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.

[RULE IV.]

Where Court thinks facts ought to have been admitted which are not, it may order costs of proof.

The latter part of this rule is very important, and, duly used by the Judges, is calculated to have a most beneficial effect.

5. Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other person or persons, he shall add to the title of his defence a further title similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

[RULE V.]

Where defendant raises counter-claim involving persons other than himself and plaintiff, he shall entitle his defence further, &c.

In an action by vendors against purchasers, who were brokers for a third party, the defendants applied by summons as to whether they should add to the title of their statement of defence the name of the third party, their counterclaim being for deductions they had to allow the third party for the inferior quality of the goods. Held that this rule did not require the

(a) *Atkins v. Taylor*, W. N. 1876, 11 ; 20 S. J. 218 ; see also *Margate Pier and Harbour Co. v. Perry*, W. N. 1876, 52 ; 20 S. J. 279 ; but see **O. XXI., r. 4**.

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COURT.

Ord. 22.

[RULE V.]
—

new name to be added (*a*), but see *Furness v. Booth* (*b*), in which it was held that, notwithstanding the case of *Shepherd v. Beane*, 2 Ch. D. 223, 24 W. R. 363 (*c*), a pleading which asks no cross relief against the plaintiff, either alone or with some one else, is no counterclaim, and does not in consequence fall within this rule. Where a pleading was headed "Statement of defence and counterclaim," it was objected that the defendant could not rely on subject of counterclaim as a set-off. Held, that the facts might be relied on either as a defence or a counterclaim, and might be used as a set-off (*d*). An action had been brought to recover balance of purchase-money due on the sale of a public-house. The defendant sought to set up a counterclaim for return of money paid as a deposit on false representations alleged to have been made to the defendant in the action by one Smith, and an application had been made to join Smith, who was alleged to be an agent of the plaintiff's, as co-defendant to the counterclaim with the plaintiff, which the Master had refused. The order was made to join him, costs to be defendant's in any event (*e*). See on this rule, *Street v. Gover* (*f*).

[RULE VI.]
—

Such person
not being party
shall be sum-
moned to
appear by
service of copy
of defence.

6. Where any such person as in the last preceding rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are herein-before contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 4 in Appendix (B.) hereto, or to the like effect.

Most of the cases under last rule may be looked to as under this rule also.

[RULE VII.]
—

Person so
served to
appear as if
served with
writ of sum-
mons.

7. Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.

A similar remark to that made on last rule is here again to be made.

[RULE VIII.]
—

Time when
person named
as party to
counter-claim
may reply

8. Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

See cases on r. 5, *supra*.

(*a*) *Anon.*, 20 S. J. 81 ; see also *Warner v. Twining*, 24 W. R. 536 ; *Swansea Shipping Co. v. Duncan*, *ante*, p. 27.

(*b*) 4 Ch. D. 586 ; 46 L. J. Ch. D. 112 ; 25 W. R. 267 ; *ante*, p. 246 ; note to O. XVI., r. 17.

(*c*) See also *Harris v. Gamble*, W. N. 1877, 142 ; 21 S. J. 631.

(*d*) *Newell, alias Wavell v. The National Provincial Bank*, 1 C. P. D. 496 ; 45 L. J. C. P. D. 285 ; 34 L. T. N. S. 533 ; 24 W. R. 458.

(*e*) *Bartholomew v. Rawlings*, W. N. 1876, 56 ; 20 S. J. 281.

(*f*) *Ante*, p. 29 ; 2 Q. B. D. 498 ; 46 L. J. Q. B. D. 582 ; 36 L. T. N. S. 766 ; 25 W. R. 750.

9. Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply, apply to the Court or a Judge for an order that such counter-claim may be excluded, and the Court or a Judge may, on the hearing of such application, make such order as shall be just.

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COURT.

Ord. 22.

[RULE IX.]

Where defendant sets up counter-claim in defence, other party may apply before reply to exclude it.

In an action for libel, in charging a director of a company with conspiracy and fraud, a counterclaim for damages in respect of loss on shares bought on misrepresentations made by the plaintiff and others, an order was made to strike out the counterclaim without prejudice to any action the defendant might bring, and on terms that the plaintiff should not issue execution on any judgment he might obtain without leave of Court or a Judge. Special allowance of £1 1s. to solicitors on each side was made under provision in new scale of costs (a). See case before cited of *Padwick v. Scott* (b). In June, 1870, the defendants Brassey & Co. purchased land at Marseilles for the purposes of a railway, of which they had a concession. The vendor, during negotiations, wrote a letter to Dobson, promising to pay him a sum of £8,000 for commission for bringing about the transaction, and a few days afterwards another letter, promising him a further commission of £6,000 "on account of Mr. Bowles," in consideration of Mr. Bowles signing a contract relating to the concession between himself and Brassey & Co. In the event of the purchase being completed, Brassey & Co. were authorised to pay both these commissions out of their purchase-money. The plaintiffs alleged that Dobson, having misapplied moneys in his hands belonging to them, had assigned his interest under both the above letters to them, to make good his defalcations. The defendants, Brandons, alleged that they were prior mortgagees of Dobson's interest under both these letters, and the plaintiffs and defendants, Brandons, agreed that Bowles had no beneficial interest in either of the sums. The defendant, Harrison, delivered a defence and counterclaim, making the plaintiffs and all the other defendants, defendants to the counterclaim, whereby he alleged that Bowles was beneficially entitled to the commission of £6,000, and also to £1,000, part of the £8,000, and submitted that the claims of all parties should be adjudicated on by the French Court, but in case the English Court had jurisdiction, he claimed a declaration that he was entitled, as mortgagee of Bowles's interest, to the said sums of £6,000 and £1,000, and also claimed priority to the plaintiff and other defendants so far as they were concerned. The Brandons now moved that the counterclaim should be excluded or amended by striking out the parts irrelevant to Harrison's defence, citing *Padwick v. Scott* (b), and remarks of Mellish, L.J., on *Treleven v. Bray*, cited *ante* (c). The Vice-Chancellor objected to striking out the counterclaim, to which the plaintiff was a party, without hearing him, as he might think it a convenient mode of settling the question. Brandons then asked that the counterclaim should be amended by striking out such part as sought relief against them, the Brandons. The Vice-Chancellor ultimately refused the motion with costs (d). Where a question appears

Young v. Brassey.

(a) *Nicholson v. Jackson*, W. N. 1876, 38; 20 S. J. 259.

(b) 2 Ch. D. 736; 45 L. J. Ch. D. 350; 24 W. R. 723; *ante*, p. 253; **O. XIX., r. 2.**

(c) 1 Ch. D. 176; 45 L. J. Ch. D. 113; 33 L. T. N. S. 827; 24 W. R. 198; *ante*, p. 244; **O. XVI., r. 17.**

(d) *Young v. Brassey*, 21 S. J. 48.

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Ord. 22.

[RULE IX.]

between defendant and plaintiff, along with a third person, which the defendant was entitled to raise by way of cross action, the third party is rightly made a party to the counterclaim (a), but the grounds of the counterclaim must be sufficient to connect it with the plaintiff's cause of action (b). Under this rule, see also *Bartholomew v. Rawlings* (c), *Shepherd v. Beane* (d), and *Original Hartlepool Collieries Co. v. Gibb* (e).

[RULE X.]

Where set-off or counter-claim established, Court may give judgment against plaintiff for balance.

10. Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

This rule becomes necessary or at least convenient upon the enactment of O. XIX., r. 3. If counterclaims are allowed to be pleaded and contested in one action with direct claims, it is clearly just that judgment should be given for them if successful, and as a counterclaim may in value exceed the direct claim, the raising of it may necessitate a judgment in favour of the defendant against the plaintiff for the amount of it.

On this rule, see the case of *Rolfe v. McLaren*, cited *ante*, p. 264 (f).

[RULE XI.]

In Probate, opposing party may give notice that he only insists on proof in solemn form.

11. In Probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Court of Probate.

Ord. 23.

ORDER XXIII.

DISCONTINUANCE.

[RULE I.]

Plaintiff may, before reply, discontinue by notice, in whole or in part, and pay costs as to part discontinued.

The plaintiff may, at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his

(a) *Dear v. Swarder*, 4 Ch. D. 476; 46 L. J. Ch. D. 100; 24 W. R. 124.

(b) *Lee v. Colyer*, W. N. 1876, 8; 20 S. J. 177.

(c) *Ante*, p. 276; W. N. 1876, 56; 20 S. J. 281.

(d) *Ante*, p. 27; 2 Ch. D. 223; 45 L. J. Ch. D. 429; 24 W. R. 363; see also *Harris v. Gamble*, W. N. 1877, 142; 21 S. J. 651.

(e) 5 Ch. D. 713; 46 L. J. Ch. D. 311; 36 L. T. N. S. 433.

(f) 3 Ch. D. 106; 24 W. R. 816; *ante*, p. 264; O. XIX., r. 17.

alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the Record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

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COURT.

Ord. 23.

[RULE 1.]

Save as provided, plaintiff cannot withdraw Record or discontinue, but Court may, on terms, order discontinuance, &c.

Court may order, but defendant cannot, without leave, withdraw or cancel any part of defendant's grounds of defence.

The plaintiff might hitherto have discontinued at any time before verdict or judgment, and might always after discontinuance have re-commenced his action, but he must have discontinued entirely, there was no discontinuance of *part* of an action (*a*). By stat. 8 Eliz. c. 2, s. 2, the Courts were empowered to award costs at their discretion on a discontinuance; the general rule being that the plaintiff cannot discontinue without paying costs. The course under these circumstances was to take out and serve a side bar rule, which was obtainable on application, as it was ordered by Rule of H. T., 1853, that to entitle a plaintiff to discontinuance after a plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs and a consent that if they are not paid within four days after taxation the defendant shall be at liberty to sign judgment of *non pros*. The rule was a step in the cause, and therefore could not be taken out during a stay of proceedings (*b*), but when properly taken out could not be set aside (*c*). It was the duty of the plaintiff to obtain an appointment and procure the taxation to be had (*d*). If he failed to do so, the defendant might proceed in the action, for the rule was no stay of proceedings (*e*). So if after taxation he failed to pay the costs, and it were before plea, the only course seems to have been to proceed; but if after plea the defendant might sign judgment of *non pros*. by the terms of the rule. Where the plaintiff, instead of paying the costs, went on with the action and the defendant did not sign judgment, the Court held that he could not at the trial object that the cause was at an end, for that the rule not having been acted on became a nullity (*f*).

Alteration from old practice.

Plaintiff should have obtained appointment and procured taxation.

(a) *Benton v. Polkinghorne*, 16 M. & W. 8.

(b) *Murray v. Silver*, 1 C. B. 638.

(c) *Potts v. Hirst*, 6 M. & G. 934.

(d) *Whitmore v. Williams*, 6 T. R. 765.

(e) *Beeton v. Jupp*, 15 M. & W. 149; S. C. sub nom. *Baker v. Jupp*, 3 D. & L. 474.

(f) *Edgington v. Proudman*, 1 D. P. C. 152.

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Ord. 23.

[RULE I.]

Discontinu-
ance without
paying costs
only by leave.No discontinu-
ance in equity.Nonsuit for-
merly no bar to
new action.Cases under
this order.

To discontinue without paying costs, which under special circumstances was sometimes allowed (*a*), an application must have been made to the Court or a Judge. So, in order to discontinue after verdict or judgment on demurrer, it was necessary to obtain leave in like manner (*b*). Where the plaintiff discontinued before notice of trial, the defendant was not entitled in any case to costs of drawing briefs (*c*), nor of procuring evidence for his defence (*d*), nor any other costs of preparing for trial (*e*). The plaintiff was entitled to the costs of any proceedings on which he had been successful, and might set them off against the defendant's costs and sue out execution for the balance if in his favour (*f*).

There was in equity technically no such thing as a discontinuance, but practically a plaintiff might cease to do anything, and the defendant might move to dismiss the bill as against him for want of prosecution, which order would, on a sufficient case made of delay on the part of the plaintiff, be made with costs; and such an order could not be pleaded in bar of a new bill for the same relief (*g*). So that in fact it came to much the same as a discontinuance, save that it was not on the motion of the plaintiff, who could undoubtedly have moved to dismiss his own bill with costs in all probability with success, if there were any reason for such motion.

A judgment of nonsuit was hitherto no bar nor ground of defence to a new action for the same cause. This is now altered; but practically there will be little difference, for the judgment may in all reasonable cases be set aside.

The following cases have been decided on the new Order. First, it has been laid down that the intention of the order is that if the record be withdrawn, it is not to be re-entered without express leave (*h*). An application was made to vary an order made by the Master, staying an action on payment of costs. It was contended that the order would allow the plaintiff to go on with the action subsequently. Lindley, J., said: It seems to be very immaterial, but I will vary the order by substituting the word "discontinued" for "stayed" (*i*). S. commenced an action in Oct., 1875, in the Queen's Bench, for slander of title as patentee against P., who put in defence and counterclaim, alleging that a patent of his was being infringed by S., and claimed an injunction; he afterwards, without leave, abandoned his counterclaim, and brought an original action thereon in the Chancery Division against S., and therein moved for an injunction against S. It was objected that he had elected his forum, and could not, without first validly removing his counterclaim from the record, bring a new action on same subject matter. The objection was overruled, the Master of the Rolls observing that the restraint in this order on discontinuance without leave was only on the plaintiff, and did not apply to a counterclaim, and it was held that the Court had discretion to grant an injunction under s. 25, subs. 8, and this rule (*k*), which judgment was affirmed on appeal (*l*);

(*a*) See *Ames v. Rugg*, 2 D. P. C. 35; *Poensgen v. Chanter*, 6 Sc. 300; *Ford v. Stock*, 1 Dowl. N. S. 763.

(*b*) *Goodenough v. Butler*, 3 D. P. C. 751; *Sansom v. Rhodes*, 8 Sc. 557; *Benton v. Polkinghorne*, 16 M. & W. 8.

(*c*) *Doe v. Neale*, 2 M. & W. 732.

(*d*) *Rivis v. Hatton*, 8 D. P. C. 164.

(*e*) *Cooper v. Boles*, 5 H. & N. 188; *Curtis v. Platt*, 16 C. B. N. S. 465.

(*f*) *Mayor of Macclesfield v. Gee*, 13 M. & W. 470; *Elwood v. Bullock*, 6 Q. B. 383.

(*g*) *Mitford on Pl.*, 238; *Brandlyn v. Ord*, 1 Atk. 571.

(*h*) *Anon.*, 20 S. J. 32.

(*i*) *Anon.*, W. N. 1876, 40; 20 S. J. 261.

(*k*) *Plimpton v. Spiller*, 20 S. J. 391.

(*l*) 20 S. J. 412.

but it seems to have been held not to be a general rule that one may, without leave, abandon a counterclaim and proceed by original action, but merely to be discretionary to allow it in a proper case, and in the case in question leave to discontinue the counterclaim in the Queen's Bench Division had been moved for and obtained in the interval between the hearing before the Master of the Rolls and the appeal. In an action of co-ownership in Admiralty, the plaintiffs having obtained an order, requiring the defendant to deliver up the certificate of registry of the ship to them before delivering a statement of claim thereupon, wholly discontinued the action without leave of the Court. The defendant then applied to have the action dismissed with costs. Held, that defendant was entitled as of right to all the costs of the action (*a*). A plaintiff having given notice of discontinuance, and the defendant having taxed his costs, sought writ of *fi. fa.* to recover them, which was refused, no judgment being produced. Hall, V.-C., on application to him, ordered the writ to issue, and amended Form No. 1, Appendix F. (*b*). This order, however, not having met with general approval, though the course there adopted was thought generally convenient, the following order was made to meet such cases.

RULES OF COURT.

Ord. 23.

[RULE I.]

The following rule was added by Rules of the Supreme Court, June, 1876 :—

2. A defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued.

[RULE II.]

When defendant may sign judgment for costs.

This rule was numbered 2, apparently by mistake, as the following rule, also numbered 2, had been added in December, 1875 :—

2. When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties.

[RULE II.
Dec. 1875.]

Cause may be withdrawn after entry for trial.

ORDER XXIV.**Ord. 24.**

REPLY AND SUBSEQUENT PLEADINGS.

1. A plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a Judge.

[RULE I.]

Reply to be delivered within three weeks from defence.

In the case of *Litton v. Litton*, a plaintiff had delivered statement of claim; and the defendant's statement of defence, which, if untraversed, constituted a good defence; the plaintiff allowed the time named in this rule to elapse without delivering a reply, or obtaining extension of time. A motion before the expiration of six weeks was made, under **O. XXXVI.**,

(*a*) *The St. Olaf*, 2 P. D. 113; 36 L. T. N. S. 30.

(*b*) *Bolton v. Bolton*, 3 Ch. D. 276; 35 L. T. N. S. 358; 24 W. R. 663; see however remarks, 20 S. J. 581.

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COURT.

Ord. 24.

[RULE I.]
—

r. 4, within which notice of trial must be given, that action should be dismissed with costs, under O. XL., r. 11. Vice-Chancellor Hall held that a defendant seeking to dismiss was not a party applying for relief under that order, but if plaintiff did not within the six weeks give notice of trial, the defendant might give notice, or under O. XXXVI., r. 4a, might move to dismiss for want of prosecution (a). For time for further pleading where matter arises pending action, see Time Table, *post*. See also O. XX., r. 2.

[RULE II.]
—

No subsequent
pleading with-
out leave save
joinder of issue.

2. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge shall think fit.

It has been already noticed, O. XIX., r. 21, that further pleadings beyond reply seemed to be contemplated; here express provision is made for them, and indeed it can hardly happen that there shall not be cases in which they will be desirable.

In the case of *Hall v. Eve* (b), it was held that a reply ought to be special, where a special answer is wanting to the defence, and it is not a correct course in such a case to amend the statement of claim by anticipating the defence and answering it by way of charge, which seemed to be the course suggested by *Earp v. Henderson* (c), and *London and St. Katherine's Dock Co. v. Metropolitan Ry. Co.* (d).

[RULE III.]
—

Subsequent
pleadings to be
delivered with-
in four days
from previous
pleading.

3. Subject to the last preceding Rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a Judge.

On this rule see also *Hall v. Eve* (b), and *Earp v. Henderson* (c).

Ord. 25.

ORDER XXV.

CLOSE OF PLEADINGS.

On joinder of
issue without
new pleading,
pleadings close.

As soon as either party has joined issue upon any pleading of the opposite party simply without adding any further or other pleading thereto, the pleadings as between such parties shall be deemed to be closed.

On this order also, *Hall v. Eve* (b), and *Earp v. Henderson* (c), are worth referring to.

Ord. 26.

ORDER XXVI.

ISSUES.

Where plead-
ings do not
sufficiently
define issues.

Where in any action it appears to a Judge that the

(a) 3 Ch. D. 793; 46 L. J. Ch. D. 64; 24 W. R. 962.

(b) 4 Ch. D. 341; 46 L. J. Ch. D. 145; 35 L. T. N. S. 735, 926; 25 W. R. 177; *ante*, p. 259.

(c) 2 Ch. D. 254; 45 L. J. Ch. D. 738; 34 L. T. N. S. 744; *ante*, p. 259.

(d) 20 W. N. 1876, 272; 35 L. T. N. S. 733.

statement of claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge.

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Ord. 26.

It seems to be intended that the issues of fact to be tried shall in general be raised by the pleadings themselves, and this is of course the most convenient course, and if the pleadings were not limited in extent would be always possible, but they are confined usually to three steps, which may fail in bringing the parties to issue ; therefore this Rule becomes necessary.

ORDER XXVII.

Ord. 27.

AMENDMENT OF PLEADINGS.

1. The Court or a Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

[RULE I.]

Court may at any stage allow amendments or may order improper matter to be expunged.

This rule gives no doubt great latitude to the power of amendment, and has been much used. We proceed to give some cases of its application, a consideration of which will probably be the best way of arriving at the rules and limits of its application. And first, it may be said, that the introduction of the rule allowed a liberty of amendment in cases already before the Court, which certainly could not have been made use of before (*a*). Thus a case being set up at the hearing, not made by the bill at all, was allowed by the Master of the Rolls, who gave the plaintiff liberty to amend at the hearing, allowing the defendant to put in a further answer (*b*) ; and even though issue was joined before the Act came into operation, and the bill had been amended after the answer had been filed, amendment was in another case allowed at the hearing, giving the defendant liberty to adduce fresh evidence (*c*). So, where a bill had been filed in 1874, by a widow, seeking to set aside a voluntary settlement, dated the 24th September, 1873, whereby she purported irrevocably to settle her property after her own death in favour of her daughter-in-law and her children, on the ground of surprise and fraud of the daughter-in-law ; the suit was at issue before the 2nd November, 1875, was in the paper for hearing on the 24th March, 1876, and witnesses were in attendance ; the hearing was, however, postponed until the 26th of April. The plaintiff served notice of motion, that she might be at liberty to read at the hearing three affidavits filed the 3rd of August last, the purport of

Power of amendment.

(*a*) See *Lord Darnley v. London, Chatham and Dover Railway Co.*, 1 De G. & S. 204.

(*b*) *Budding v. Murdoch*, 1 Ch. D. 42 ; 45 L. J. Ch. D. 213 ; 24 W. R. 23.

(*c*) *King v. Corke*, 1 Ch. D. 57 ; 45 L. J. Ch. D. 190 ; 33 L. T. N. S. 375 24 W. R. 23.

RULES OF
COURT.

Ord. 27.

[RULE I.]

Matters will be struck out which are mere statements of law, not of fact.

Informality not a ground for erasure.

which was that she was at the date of the indenture of settlement so weak in mind as not to know what she was doing, or that she might have leave to amend her bill and use the said affidavits, and file fresh evidence. The defendant objected to the admission of such evidence as setting up a new case, and not being evidence in reply. The Vice-Chancellor remarked on the extended powers of amendment now allowed, gave leave to the plaintiff to amend the bill as she might be advised, and to file further evidence, with liberty to defendants to put in further answer and evidence, cause to stand out of the paper, and costs to be reserved until the hearing (a). Matters will be ordered to be struck out which are mere statements of law, not of fact. Thus, in an action on an agreement to pay £100 as a premium on obtaining a spirit license, the alleged agreement was contained in a lease for three years, dated May, 1871. The defence was that the lease was void, and that there was a second lease in substitution for it. The statement of claim set out the agreement, relied on the fourth paragraph of the statement of defence, stated that the agreement had been mutually rescinded, that it was void as an agreement, and that as a lease made in September, 1874, was a new final and conclusive contract; that this new lease was not grounded on the terms of the said agreement, but was at a higher rent, and that if the defendant were not before released from that agreement, he was released thereby. The Master had ordered this paragraph to be struck out, and Archibald, J., affirmed his decision on the grounds above mentioned, that the matters alleged therein were conclusions of law, not matters of fact (b). So matters of evidence will be ordered to be struck out (c). Mere prolixity also has been made a ground for striking out portions of pleadings (d). So scandalous matter should be struck out (e). And the fact that statements in pleading are embarrassing, has frequently been made a ground for pressing for their erasure and often admitted as such (f), and the fact that they have been found not embarrassing, has been urged as ground by the judge for refusing to strike them out (g). Informality is not a ground for striking out pleadings *primâ facie*, though if not amended on order, they may be struck out (h). An amendment was required to a statement of defence, which stated that a condition precedent to the liability of the defendant on a guarantee was, that the plaintiff should make an open and unsecured advance, and that they had not given a credit within this undertaking; without stating whether the undertaking was verbal or in writing, when it was made, or the parties to it. It was ordered by way of amendment that the particulars above stated should be added (i). In an action by executors for rent due partly on leasehold, partly on freehold premises, a summons for amendment of

(a) *Roe v. Davis*, 2 Ch. D. 729; 24 W. R. 606.

(b) *Menhinick v. Turner*, W. N. 1876, 55; 20 S. J. 281.

(c) *Aderis v. Thrigley*, W. N. 1876, 56; 20 S. J. 282; *Anon.*, 20 S. J. 102.

(d) *Marsh v. Mayor, &c., of Pontefract*, W. N. 1876, 7; 20 S. J. 161; *Moorhouse v. Colville*, W. N. 1876, 12; *Herring v. Bischoffsheim*, W. N. 1876, 77; see O. XIX., rr. 2, 4, 9; see also *Duncan v. Vereker*, W. N. 1876, 64; 20 S. J. 297; *Cashin v. Cradock*, 3 Ch. D. 376; 35 L. T. N. S. 452; 25 W. R. 5.

(e) *Duncan v. Vereker*, W. N. 1876, 64; 20 S. J. 297; *Blake v. Albion Life Assurance Co.*, 45 L. J. C. P. D. 663; 35 L. T. N. S. 269; 24 W. R. 677.

(f) *Restell v. Steward*, W. N. 1875, 231, 249; 20 S. J. 99, 140; *Jones v. Turner*, W. N. 1875, 239; *Askew v. N.-Eastern Railway Co.*, W. N. 1875, 238; 20 S. J. 120, 178.

(g) *Hope v. Banks*, W. N. 1876, 38; 20 S. J. 259; *Golding v. Wharton Rail. and River Salt Co.*, 1 Q. B. D. 374; 34 L. T. N. S. 474; 24 W. R. 423; see also *Anon.*, 20 S. J. 342.

(h) *Anon.*, W. N. 1876, 24; 25 W. R. 742.

(i) *Smith v. West*, W. N. 1876, 55; 20 S. J. 281.

statement of claim, by stating among other matters title of the plaintiffs to the freehold premises, an amendment was ordered by stating the title (*a*). A summons to strike out certain allegations in a statement of claim against directors of a company for false representations with respect to debentures, the allegations being some of the representations which they were stated to have made falsely, was dismissed: (see the case for particulars of the passages allowed to stand) (*b*). An attempt to compel the defendant in an action for slander to supply particulars of a conversation mentioned in the statement of defence failed, on the ground that the particulars were immaterial (*c*). To an action on a promissory note for £90, given in 1871, and renewed from time to time, the third paragraph of the statement of defence claimed, by way of counter-claim and set-off, payment of £190 in respect of scrip held by the defendant in the plaintiff company. Master had refused to strike out the paragraph, on the ground that it was a good counter-claim or ground of demurrer. The defendant was the principal shareholder in the plaintiff company, which was being wound up voluntarily. Archibald, J., said: "The holder of scrip may be entitled to shares, but not to money. The defendant must set out enough to show that he has a claim for money against the plaintiffs; shares are not money." Order that Paragraph 3 be amended or excluded, costs to be costs in the cause (*d*). A reply joining issue generally on a counter-claim, will not be ordered to be amended or struck out for want of specific dealing with allegations of counter-claim (*e*) (see on this case, **O. LIX.** also). The power to order allegations to be struck out is discretionary, and any allegations which would not have been improper in a pleading before the Acts, may have their propriety dealt with on taxation of costs, and *prima facie* will not be struck out (*f*). The Court of Appeal also on this ground will not, except under very special circumstances, where its refusal would cause irreparable injury, interfere with the discretion of a judge of first instance in the matter of striking out or refusing to strike out allegations in pleadings (*g*) (see on this matter also **O. LVIII., r. 2**). It is not correct now to order statement of claim to be amended, by making it anticipate defence, and meet it by way of charge; the right course where defence requires specific answer, is to reply specially (*h*). An affidavit of the nature of amended defence is not now requisite for leave to amend (*i*). In *The Chesterfield Colliery Co. v. Black* (*k*), an application was made for leave to amend statement of claim, in consequence of the plaintiff having, by examining documents of which discovery was obtained in the suit, discovered new matter pertinent to his cause; it was objected that he must show he had used due dispatch, and that his proposed amendments were material. Bacon, V.-C., allowed amendment without any such condition. In *Cashin v. Cradock* (*l*), the

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[RULE I.]

Power to order
allegations to
be struck out
discretionary.

(*a*) *Bannicot and Frith v. Harris*, W. N. 1876, 9; 20 S. J. 217.

(*b*) *Weir v. Barnett*, W. N. 1875, 258; 20 S. J. 140; *Cashin v. Cradock*, 3 Ch. D. 376; 35 L. T. N. S. 452; 25 W. R. 4.

(*c*) *Colonial Assurance Co. v. Prosser*, W. N. 1876, 55; 20 S. J. 281.

(*d*) *Cadogan Advance Co., Limited, v. Shepherd*, W. N. 1876, 74; 20 S. J. 299.

(*e*) *Rolfe v. McLaren*, 3 Ch. D. 106; 24 W. R. 816; *ante*, p. 264.

(*f*) *Watson v. Rodwell*, 3 Ch. D. 380; 45 L. J. Ch. D. 744; 35 L. T. N. S. 86; 24 W. R. 1009.

(*g*) *Golding v. Wharton Railway and River Salt Works*, 1 Q. B. D. 374; 34 L. T. N. S. 474; 24 W. R. 423.

(*h*) *Hall v. Eve*, 4 Ch. D. 341; 46 L. J. Ch. D. 145; 35 L. T. N. S. 926; 25 W. R. 177.

(*i*) *Cargill v. Bower*, 4 Ch. D. 78; 46 L. J. Ch. D. 175; 35 L. T. N. S. 621; 25 W. R. 221.

(*k*) W. N. 1877, 65; 25 W. R. 409.

(*l*) 3 Ch. D. 376; 35 L. T. N. S. 452; 24 W. R. 4.

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[RULE I.]
—

Inconsistency.

entire statement of claim was ordered to be struck out, part being unintelligible, part irrelevant, and other part containing offensive charges against the defendants. In an action to restrain infringement of patent granted to Chamberlain, and by him assigned to plaintiff, and for damages: Chamberlain was partner with another defendant, Smith, and both were charged with infringements. Smith's statement of defence contained clauses disputing the validity of the patent. The plaintiff moved under this rule to strike out these clauses as embarrassing, as Smith was estopped from disputing his partner's patent. The Master of the Rolls held, that Smith was in no wise so estopped, and that a defence could only be said to be embarrassing when it was one to which the defendant had no right to have recourse, and he refused to strike out the clauses (a) (see on this rule also *Harris v. Gamble*) (b). In the case of *Bagot v. Easton* (c), the plaintiff by his statement of claim sought relief, first, that certain agreements, by which the plaintiff and his cousin were to become partners with the defendant in an adventure on certain terms, and at the end of three years, if they wished to proceed further with the matter, a partnership deed was to be executed, and the adventure continued for a term of twenty-one years, might be cancelled on the ground of misrepresentation by the defendant, and ignorance by the plaintiff of their true effect, or, alternatively, that the partnership might be dissolved, the accounts taken, and assets valued, and in either case a receiver and manager should be appointed, and an injunction granted to restrain the defendant from interfering with the management or stopping the works upon the estate. Vice-Chancellor Bacon held that the statement of claim disclosed two totally inconsistent states of facts, and suggested two totally different forms of relief upon totally inconsistent grounds, and that the plaintiff therefore was bound to make up his mind on which he intended to rely, and that the statement of claim ought to be amended by striking out one or other of the causes of action in respect of which plaintiff sought relief.

But inconsistency of defences, such as never indebted, and payment, is no ground for striking out or amending statement of defence, as both may be true, since payment may have been made, though money was not due (d).

[RULE II.]
—

Time when
plaintiff may
without leave
amend state-
ment of claim.

2. The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply, and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

[RULE III.]
—

Time when
defendant
having pleaded
set-off or
counter-claim
may without
leave amend.

3. A defendant who has set up in his defence any set-off or counter-claim may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto, or in case there be no reply, then at any time before the expiration of twenty-eight days from the filing of his defence.

(a) *Heugh v. Chamberlain*, W. N. 1877, 128 ; 25 W. R. 742.

(b) W. N. 1877, 142 ; 21 S. J. 651.

(c) W. N. 1877, 176.

(d) *Barnicott v. Hann*, W. N. 1876, 24 ; 20 S. J. 242.

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[RULE IV.]

4. Where any party has amended his pleading under either of the last two preceding Rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court or a Judge to disallow the amendment, or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just.

After amendment, time when opposite party may apply to disallow it.

[RULE V.]

5. Where any party has amended his pleading under Rule 2 or 3 of this Order, the other party may apply to the Court or a Judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just.

After amendment other party may apply for leave to plead or amend.

See *Durling v. Lawrence*, W. N. 1877, 182.

[RULE VI.]

6. In all cases not provided for by the preceding Rules of this Order, application for leave to amend any pleading may be made by either party to the Court or a Judge in Chambers, or to the Judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just.

In other cases any party may apply for leave to amend any pleading.

Under this rule also see *Cargill v. Bower* (a). As to amendment pending demurrer, see **O. XXVIII.**, r. 7.

Leave was given to the plaintiff, on application at the hearing, to amend, by charging some one or more acts of default, but on terms that he should not enter into new evidence, and should pay the costs of the present hearing (b).

[RULE VII.]

7. If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become ipso facto void, unless the time is extended by the Court or a Judge.

Party having leave to amend not amending within time allowed or within 14 days from leave, leave fails.

[RULE VIII.]

8. A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on

Amendments, how to be made.

(a) *Ante*, p. 285 ; 4 Ch. D. 78 ; 46 L. J. Ch. D. 175 ; 35 L. T. N. S. 621 ; 25 W. R. 221.

(b) *King v. Corke*, 1 Ch. D. 57 ; 45 L. J. Ch. D. 190 ; 33 L. T. N. S. 375 ; 24 W. R. 23 ; *ante*, p. 283, r. 1 ; see also *Budding v. Murdoch*, 1 Ch. D. 42 ; 45 L. J. Ch. D. 213 ; 24 W. R. 23 ; *ante*, p. 283, r. 1.

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[RULE VIII.]

paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended.

This rule is almost the same in substance as Consolidated Order 9, Rule 8; the limit of writing in Bills in Chancery used to be two folios of 90 words, *i.e.*, 180 words, now made 144.

[RULE IX.]

Amended
pleading to be
marked.

9. Whenever any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, *viz.* :
"Amended day of ."

[RULE X.]

When amended
pleading to be
delivered.

10. Whenever a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same.

The following rule has been added by the Rules of the Supreme Court, February, 1876 :—

[RULE XI.]

Power of Court
or Judge to
allow amend-
ment of writ of
summons.

11. The Court, or a Judge, may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner, and on such terms, as may seem just.

A writ had been altered after issue and before service, by striking out surname, Townsend, under a mistake: and a motion was made to amend it. All the affidavits were entitled as according to altered writ; the Vice-Chancellor thought that the plaintiff's affidavits must, if the defendants pressed the point, be re-sworn, but that the plaintiffs might allow the defendants to use theirs. It was agreed that the affidavits should be used without re-swearing, but that no order need be drawn up (*a*).

When a statement of claim has once been delivered, amendment of indorsement on the writ is unnecessary (*b*).

Before the publication of this rule the Master of the Rolls exercised the power hereby given (*c*).

Ord. 28.**ORDER XXVIII.****DEMURRER.**

[RULE I.]

Any party may
demur to any
pleading of the
other side, or

1. Any party may demur to any pleading of the opposite

(*a*) *Re Mouall's Estate*, 20 S. J. 451.

(*b*) *Large v. Large*, W. N. 1877, 198.

(*c*) *Worraker v. Pryor*, 2 Ch. D. 109; 45 L. J. Ch. D. 273; 24 W. R. 269.

party, or to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counter-claim, reply, or as the case may be, on the ground that the facts alleged therein do not show any cause of action, or ground of defence to a claim or any part thereof, or set-off, or counter-claim, or reply, or as the case may be, to which effect can be given by the Court as against the party demurring.

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[RULE I.]

to any part
setting up a
distinct case.

This rule is founded on s. 50 of the Common Law Procedure Act, 1852, but is a little more particular in form, but the express abolition of special demurrers contained in that Act is not specifically repeated; it is nevertheless submitted that that abolition will still be continued.

If a paragraph in a pleading set up a distinct cause of action, ground of defence, set-off, counter-claim, or reply, the proper course for the party objecting thereto is to demur, and not to apply at Chambers to strike out the paragraph. He may in the same pleading as his demurrer join issue upon the other paragraphs of the preceding pleading; and then, upon the argument of the demurrer, he will be taken to admit only the facts stated in the paragraph demurred to. Semble, he may however refer to the facts stated in other paragraphs of his opponent's pleadings whenever they disclose facts in his favour. Facts stated in a pleading need not be assigned to any particular prayer; so long as they tend to show that the party relying on them is entitled to any of the reliefs claimed, the paragraph containing them is not demurrable. And *per* Lindley, J., so long as they entitle the party pleading them to any relief at all, whether expressly prayed for or not, the paragraph is not demurrable (*a*). The limitation of liability under s. 54 of Merchant Shipping Act, 1862, is ground of equitable defence, and not mere plea to damage; and when raised in statement of defence, ought to be met, not by motion to strike out, but by demurrer (*b*). The defendant had demurred to a statement of claim, and the Master had refused to strike out the demurrer as frivolous. The action was for breach of contract to pay deposit money. On appeal, the Judge said the real point is: Is this money due to the plaintiff as a debt? If it is not, the demurrer is good; it is certainly not frivolous. The appeal is dismissed with costs, the plaintiff to have leave to amend his statement of claim (*c*).

2. A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated. A demurrer may be in the Form 28 in Appendix (C.) hereto. If there is no ground, or only a frivolous ground of demurrer stated, the Court or Judge may set aside such demurrer, with costs.

[RULE II.]

Demurrer to
state whether
to whole or part
of opposite
pleading.

Frivolous de-
murrer set
aside with
costs.

Hitherto a demurrer was not necessarily limited, as is provided by this Rule, but might be partially good and partially bad, in which case of late

(a) *Watson v. Hawkins*, 24 W. R. 884.

(b) *Wahlberg v. Young*, 45 L. J. C. P. D. 783; 24 W. R. 847.

(c) *Wilks v. Parker*, W. N. 1876, 74; 20 S. J. 298.

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[RULE II.]

Erroneous
practice
abrogated.

Plaintiff might
enter nolle pro-
sequi on bad
count or breach
and pay costs
thereon.

3 & 4 Wm. 4,
c. 42, s. 33.

If statement
that demurrer
is to whole and
held good as to
part only,
query result.

15 & 16 Vic.
c. 76, s. 89.

as formerly the plaintiff had judgment on such part as was determined in his favour, and the defendant on the part on which he was successful (*a*); this was a return to the old practice, from an erroneous one which had crept in, in analogy to demurrers in Chancery, of giving a general judgment for plaintiff on demurrer to more counts or breaches than one, if any of them was good, allowing him to cure the defect of those which were bad by entering as to them a nolle prosequi or a remittitur damna if damages had been separately assessed on them (*b*); this impropriety was remarked in a note by Serjeant Manning, cited p. 215, 1 M. & G. 201, n. (*a*), and was thereupon rectified: see two cases last cited under (*b*). But the plaintiff might still enter nolle prosequi as to the bad count or breach before argument, leaving the demurrer to stand as to the other, in which case he would have to pay the costs of the defendant as to the bad count or breach (*c*).

Where, however, the defendant's demurrer was to the whole action on several grounds, the plaintiff was not allowed to enter a nolle prosequi on some grounds of the demurrer, so as to throw on the defendant the risk of costs in supporting only part of his objection (*d*). But where the demurrer was to one count only, the plaintiff might enter a nolle prosequi to that count (*e*). By 3 & 4 Wm. 4, c. 42, s. 33, "where any nolle prosequi shall have been entered upon any count, or as to any part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf." Before this the defendant was not as of course entitled to any costs in such a case, but it was held that the enactment did not alter the former practice so as to make the entry of a nolle prosequi regular, which was before irregular (*f*). The right course in such a case seems to have been to apply for leave to amend the count demurred to, upon which the defendant gained the costs of his demurrer as well as time to plead de novo.

The demurrer is now ordered distinctly to be specific in stating whether it be to the whole or any and what part of a pleading; but supposing the statement to turn out erroneous, as for instance where it is stated as to the whole declaration, and that on argument it is held good as to some part and bad as to the rest, it does not seem at all clear what is to be the result of such a condition now. It is submitted that in such case the judgment should be for the parties distributively as they are found right or wrong, as is the practice above mentioned.

In fact this rule makes very little difference from the Common Law Procedure Act, 1852, s. 89, save that that section, applying to Common Law matters, only went on to give leave on setting aside a demurrer to sign judgment as for want of a plea, which, however, is struck out of the present Rule, as Chancery proceedings are now assimilated to those at Common Law. In Chancery the overruling a demurrer did nothing further than put the defendant to his answer. The former enactment, Common Law Procedure Act, 1852, s. 89, required that the demurrer

(*a*) See *Pinkney v. Inhabitants of East Hundred*, 2 Saun. 379; *Bressey v. Humphreys*, Cro. Jac. 557; *Woody's Case*, *ibid.* 104; *Powell v. Graham*, 7 Taun. 580; *Ingledeu v. Cripps*, 2 Ld. Raym. 814; *Briscoe v. Hill*, 10 M. & W. 735; *Dawson v. Wrench*, per Parke, B., 3 Ex. 365; see 1 M. & G. 201, n. *a*.

(*b*) *Wainwright v. Johnson*, 5 D. P. C. 317; *Boydell v. Jones*, 4 M. & W. 446; *Webb v. Baker*, 3 Nev. & P. 87; *Parett Navigation Co. v. Stower*, 6 M. & W. 564.

(*c*) Under 3 & 4 Will. 4, c. 42, s. 33.

(*d*) *Butler v. Mapp*, 10 Bing. 391; *Drummond v. Dorant*, 4 T. R. 360; *Rose v. Bowler*, 1 H. Bl. 108.

(*e*) *Milliken v. Fox*, 1 B. & P. 157.

(*f*) *Butler v. Mapp*, 10 Bing. 391.

should in the margin contain, as the present rule also requires a demurrer to contain, some substantial matter of law intended to be argued, which was held not to compel the party demurring to disclose all the points which he meant to argue, but merely to secure that the demurrer was *bonâ fide* (a), and if he stated several grounds, he was not compelled to state on which he relied (b).

In Chancery, on the other hand, if a defendant demurred on two distinct grounds, *e.g.*, for want of equity and want of jurisdiction, he should state them both as separate causes of demurrer (c), though it seems there would only be one order in such a case on the demurrers (d). But this rule, founded on or expressed by Consolidated Orders, O. XIV., r. 1, as follows:—"Where any grounds of demurrer are urged in arguing a demurrer beyond the grounds therein expressed, and those grounds which are so expressed are disallowed, the defendant shall pay the same costs as if the demurrer were overruled, although the grounds of demurrer so newly urged may be allowed," did not in fact bind one to set forth more than the very general nature of the grounds of demurrer, *e.g.*, whether the demurrer was for want of equity, for want of parties, for want of jurisdiction, for incapacity of the plaintiff, for multifariousness or the like; thus many demurrers would be perfectly good on this ground in equity, which would be held at law as too general; so the ground that the matters disclosed in the plea contain no answer to the declaration was held too general, yet that is the very effect that is stated by saying that the bill is demurrable for want of equity.

Notwithstanding the rule cited, the demurrer *ore tenus* as it was called still continued, and any ground of demurrer co-extensive with the demurrer on record, might be taken and allowed at bar (e), the order being on the defendant to pay the costs of the demurrer on the record (f).

It was held, however, at law formerly that a demurrer could not be treated as a nullity, however frivolous the point taken on record might be, or though no point were stated (g). Nor was the party demurring precluded from arguing his demurrer because it was delivered without any statement of points (h); the only course open in such case to the other side was to move the Court to set it aside, and the Court would not do that where a point was stated that contained anything capable of argument (i). The application might of course have been made either by plaintiff or defendant, as the case might be (k). Where demurrer to a replication to a plea to the whole declaration was set aside, judgment was signed on the whole record, though there were other pleas to the whole (l).

On setting aside a demurrer on the ground that the point of law taken on it was frivolous, it seems it was sufficient if the rule stated it to be set

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[RULE II.]

Demurrer *ore tenus*.

Demurrer not a nullity though point taken frivolous.

Course open to party objecting to demurrer.

Setting aside demurrer on frivolous point.

(a) *Ross v. Robeson*, 3 D. P. C. 779; *Braham v. Watkins*, 16 M. & W. 77.

(b) *Whitmore v. Nicholls*, 5 D. P. C. 521.

(c) *Barber v. Barber*, 4 Drew. 666.

(d) *Wellesley v. Wellesley*, 4 M. & C. 554-556.

(e) *Rump v. Greenhill*, 20 Beav. 512; *Henderson v. Cook*, 4 Drew. 306; *Barber v. Barber*, 4 Drew. 666; *Cooper v. Earl Powis*, 3 De G. & Sm. 688.

(f) *Att.-Gen. v. Brown*, 1 Sw. 288; *Cooper v. Earl Powis*, 3 De G. & Sm. 688; *Mortimer v. Fraser*, 2 M. & Cr. 173; *MacIntyre v. Connell*, 1 Sim. N. S. 257; but see *Brown v. Douglass*, 11 Sim. 283; *Newton v. Earl of Egmont*, 4 Sim. 574.

(g) *Lyons v. Cohen*, 3 D. P. C. 243.

(h) *Lacey v. Umbers*, 3 D. P. C. 732.

(i) *Chevers v. Parkington*, 6 D. P. C. 75; *Edwards v. Greenwood*, 5 B. N. C. 476; see *Tallis v. Tallis*, 21 L. J. Q. B. 269; 1 E. & E. 397, n. a.

(k) *Cutts v. Surridge*, 9 Q. B. 1015.

(l) *Tucker v. Barmsley*, 16 M. & W. 54.

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[RULE II.]

aside for irregularity (*a*), but it was said that a frivolous demurrer was not merely an irregularity, but an improper proceeding, which the Court might set aside at any time, and in one case it was set aside after time obtained for joinder in demurrer (*b*). The pleadings must have been set out in the affidavit, or the rule drawn up "on reading" them, otherwise the Court could not look at them (*c*). In the Exchequer the Rule might be framed so as to become absolute unless cause were shown before a particular time (*d*). Where a Judge had set aside a demurrer on this ground, the Court were very averse to interfering (*e*).

Where a defendant demurs on a specific ground, and also "on other grounds sufficient in law to sustain the demurrer," a defence of the Statute of Limitations is properly raised upon the demurrer (*f*).

[RULE III.]

Demurrer to be
delivered as
other pleading.

3. A demurrer shall be delivered in the same manner and within the same time as any other pleading in the action.

The time for demurring is thus eight days after statement of claim, three weeks after statement of defence, and four days after reply on subsequent pleading.

On this rule see *Hodges v. Hodges* (*g*).

[RULE IV.]

Demurrer and
defence where
needed to be
combined, and
so of further
pleadings.

4. A defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party, he shall combine such demurrer and other pleading.

See on this rule *Watson v. Hawkins* (*h*).

[RULE V.]

Party desiring
to plead and
demur to same
matter to apply
for leave.

5. If the party demurring desires to be at liberty to plead as well as to demur to the matter demurred to, he may, before demurring, apply to the Court or a Judge for an order giving him leave to do so; and the Court or Judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to him to plead after the demurrer is overruled, or may make such other order and upon such terms as may be just.

(*a*) *Jackson v. Cawley*, 2 Jur. 207.

(*b*) *Cutts v. Surridge*, 9 Q. B. 1015; but see *Norton v. Mackintosh*, 7 D. P. C. 529.

(*c*) *Howorth v. Hubbersty*, 3 D. P. C. 455; *Hamer v. Anderton*, 9 D. P. C. 119; *Danieli v. Lewis*, 1 Dowl. N. S. 542.

(*d*) *Kinnear v. Keane*, 3 D. P. C. 154.

(*e*) *Lane v. Ridley*, 10 Q. B. 479.

(*f*) *Dawkins v. Lord Penrhyn*, W. N. 1877, 188; 36 L. T. N. S. 680; 37 L. T. N. S. 80; 21 S. J. 730.

(*g*) 2 Ch. D. 112; 45 L. J. Ch. D. 750; 24 W. R. 293, *ante*, pp. 268, 274.

(*h*) 24 W. R. 884, *ante*, p. 289.

The Common Law Procedure Act, 1852, sect. 80, was more precise in the conditions annexed to the grant of this power; it required, if the Judge asked it, an affidavit on the part of the defendant of the truth of the matters intended to be pleaded, as well as of the defendant's belief that the defence was good at law, his belief of his right to traverse any matters he proposed to traverse, and a submission to the discretion of the Court which issue should be first disposed of. And it has been held that if he propose to traverse as well as demur, and the matters to be traversed lay within his own knowledge, he might be required to swear that the matters he proposed to traverse were untrue (*a*). And even where the affidavit was sufficient, the Court was not bound to grant leave, it was purely discretionary even then (*b*). Where leave was granted, and judgment was given against an earlier pleading of the demurring party, the Court would not, at the instance of the successful party, rescind the order for a traverse, for they held that it could not be certain their judgment in the demurrer might not be reversed (*c*). The words "disposed of" have reference merely to the Court in which the action is brought, not to proceedings in error (*d*).

The new rule is, however, much wider than the old, and allows a much more varied order, as may be convenient. Rule enlarged.

In an application for leave to plead and demur, the ground of demurrer was that plaintiff by statement of claim showed no ground of action, this was allowed on appeal (*e*).

6. When a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately, and the party so entering such demurrer shall on the same day give notice thereof to the other party. If the demurrer shall not be entered and notice thereof given within ten days after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend, the demurrer shall be held sufficient for the same purposes and with the same result as to costs as if it had been allowed on argument.

[RULE VI.]

When demurrer delivered, either party may enter it for argument immediately, and give notice. If not entered within ten days, &c.

The latter part of this rule seems modelled on, and much to the same effect as the Consolidated Orders, O. XIV., rr. 14 and 15, save that the time limited is shortened to an even term of ten days.

In the case of *Wills v. Harris*, the plaintiff had delivered a reply and demurrer to the defendant's pleading, and the defendant had joined issue. More than ten days had elapsed since demurrer had been delivered, and the defendant had neither entered the demurrer nor served notice for leave to amend, it was ordered that the demurrer be allowed (*f*).

7. While a demurrer to the whole or any part of a pleading is pending, such pleading shall not be amended, unless

[RULE VII.]

Pleading demurred to not to be amended pending demurrer without leave.

(*a*) *Lumley v. Gye*, 22 L. J. Ex. 9, see note (7) to *Platt v. Else*, 22 L. J. Ex. 192; *Price v. Hewett*, 8 Ex. 146.

(*b*) *Thompson v. Knowles*, 24 L. J. Ex. 43.

(*c*) *Sheehy v. The Professional Life Assurance Co.*, 13 C. B. 801.

(*d*) *Lumley v. Gye*, 2 E. & B. 216.

(*e*) *Anon.*, W. N. 1876, 37; 20 S. J. 260.

(*f*) 20 S. J. 501.

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[RULE V.]

15 & 16 Vic.
c. 76, s. 80.

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[RULE VIII.]

On demurrer allowed, party demurred to to pay costs of demurrer.

Semble, reverses old rule in many cases.

by order of the Court or a Judge; and no such order shall be made except on payment of the costs of the demurrer.

8. Where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs of the demurrer.

This rule, if fully enforced on every occasion, will reverse the Rule in Chancery mentioned above, Consolidated Orders, O. XIV., r. 1; for suppose a demurrer *ore tenus* allowed, the demurrer on the record being held to be bad on the grounds there urged, it is clear under the former rule costs would be against the defendant demurring, but it is submitted must under this rule be given for him. It is true that the condition is inserted, "unless the Court shall otherwise order," and that the rule is very like Consolidated Orders, O. XIV., r. 13; but in this rule the demurrer allowed on argument must clearly be the actual demurrer on the record, and no demurrer on terms or on other grounds than alleged on the record. But in fact the words "unless the Court otherwise order," leaves the whole matter in the discretion of the Court (a), and takes away the value of the rule, as a rule, almost entirely.

Where there was a demurrer on the ground that the action should have been brought in the name of the Company, instead of by a shareholder, the demurrer was allowed; but it appears that the defendants had been guilty of great fraud. The question of costs was deferred until the hearing (b).

[RULE IX.]

On demurrer to whole statement of claim allowed, plaintiff to pay to defendant demurring whole costs of action.

9. If a demurrer to the whole of a statement of claim be allowed, the plaintiff, subject to the power of the Court to allow the statement of claim to be amended, shall pay to the demurring defendant the costs of the action, unless the Court shall otherwise order.

This rule was virtually, as to Chancery, involved in the Consolidated Orders, O. XIV., r. 13, and under that rule an order allowing a demurrer with costs, carried with it the costs of a pending motion (c). And where a motion for an injunction stood over at the request of a defendant, who had filed a demurrer which was allowed on appeal, and the plaintiff ordered to pay the costs of demurrer and costs of suit, it was held that the costs incurred on the motion were costs of suit (d).

[RULE X.]

Where demurrer allowed, the part of pleading demurred to to be deemed struck out as between parties to demurrer.

10. Where a demurrer to any pleading or part of a pleading is allowed in any case not falling within the last preceding Rule, then (subject to the power of the Court to allow an amendment) the matter demurred to shall as between the parties to the demurrer be deemed to be struck out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded.

(a) *Schneider v. Lizardi*, 9 Beav. 461.

(b) *Duckett v. Gover*, 46 L. J. Ch. D. 407; W. N. 1877, 62; 25 W. R. 455.

(c) *Gladstone v. Ottoman Bank*, 1 N. R. 512.

(d) *Finden v. Stephens*, 12 Jur. 319, overruling S. C., 11 Jur. 898.

11. Where a demurrer is overruled, the demurring party shall pay to the opposite party the costs occasioned by the demurrer, unless the Court shall otherwise direct.

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[RULE XI.]

This rule, as to Chancery, was ordered heretofore by the Consolidated Orders, O. XIV., r. 12.

As to costs where demurrer overruled.

[RULE XII.]

12. Where a demurrer is overruled, the Court may make such order and upon such terms as to the Court shall seem right for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to.

Court may order demurring party to raise by pleading case against matter demurred to.

This rule, which is necessitated, one might almost say, by the fact that the rules have to do with equity procedure as well as with that at common law, seems at the same time to do away with the exigency of r. 5, though it may be convenient to have both forms of procedure.

13. A demurrer shall be entered for argument by delivering to the proper officer a memorandum of entry in the Form No. 29 in Appendix (C).

[RULE XIII.]

Form of entering demurrer for argument.

ORDER XXIX.

Ord. 29.

DEFAULT OF PLEADING.

1. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a Judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or Judge may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as to the Court or Judge shall seem just.

[RULE I.]

If plaintiff bound to deliver statement of claim does not deliver same in due time, defendant may apply to dismiss with costs for want of prosecution.

Under this rule, on application to dismiss with costs for want of prosecution, the old order to speed the cause was made at the instance of the plaintiff, but such order the Court said was not to be general (a). See further on this rule *Anon* (b). *Wright v. Swindon, Marlborough, and Andover Railway Co.* (c); *Durling v. Lawrence* (d).

2. If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed

[RULE II.]

If plaintiff's claim be only for liquidated demand, &c.

(a) *Higginbottom v. Aynsley*, 3 Ch. D. 288; 24 W. R. 782.

(b) W. N. 1876, 37.

(c) 4 Ch. D. 164; 46 L. J. Ch. D. 199.

(d) W. N. 1877, 182.

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[RULE II.]

for that purpose, deliver a defence or demurrer, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs.

See note on Judgment in Default of Pleading.

Where no pleading is necessary no judgment can be signed under this rule (a), except where writ is specially indorsed when no statement of claim need be made; but the practice set forth in O. XXI., r. 4, should be followed. See *Atkins v. Taylor* (b). An action was set down for default of pleading before the Master of the Rolls in the short cause paper without the consent of the defendant, and when called on, the counsel for the plaintiff stated that this had been done solely in order to obtain the direction of the Court as to how such a case should be heard, as it would be a great hardship on the plaintiff to delay him until the cause came into the paper in its regular order. The Master of the Rolls made an order fixing an early day for it to be in the paper (c). A statement of defence to an action against husband and wife jointly, purporting to be a statement of the defendants, but being really a defence of the wife alone, was held not sufficient to prevent final judgment under this rule against the husband, moved for under O. XL., r. 11 (d); but see *Gillott v. Ker* (e).

Semble this rule does not apply to Admiralty actions *in rem*, in which the plaintiff must proceed as before the Acts (f).

[RULE III.]

In such action, if more than one defendant, plaintiff may in such case have judgment and execution against defaulter, &c.

3. When in any such action as in the last preceding Rule mentioned there are several defendants, if one of them make default as mentioned in the last preceding Rule, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants.

With this rule compare O. XIII., r. 4.

On this rule see also note on Judgment in Default of Pleading, *ante*, p. 203.

[RULE IV.]

If claim be for detention of goods or damages, and defendant make default, plaintiff may enter interlocutory judgment, &c.

4. If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant, and a writ of inquiry shall issue to assess the value of the goods, and the damages, or the damages only, as the case may be. But the Court or a Judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of

(a) *Hooper v. Giles*, W. N. 1876, 10; 20 S. J. 217.

(b) W. N. 1876, 11; 20 S. J. 218.

(c) *Meakin v. Sykes*, 24 W. R. 293.

(d) *Jenkins v. Davies*, 1 Ch. D. 696; 24 W. R. 690.

(e) W. N. 1876, 116; 24 W. R. 428, *post*, 299.

(f) *The Sfactoria*, 2 P. D. 3; 35 L. T. N. S. 431; 25 W. R. 62; see s. 18 of Act of 1875, *ante*, p. 119.

them, shall be ascertained in any way in which any question arising in an action may be tried.

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[RULE IV.]

With this rule compare O. XIII., r. 6.

On this rule also see note on Judgment in Default of Pleading, *ante*, p. 203.

5. When in any such action as in Rule 4 mentioned there are several defendants, if one of them make default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant so making default, and proceed with his action against the others. And in such case damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a Judge shall otherwise direct.

[RULE V.]

Where more than one defendant in such action, and one of them in default, plaintiff may enter interlocutory judgment against defaulter, and proceed against others, &c.

On this rule also see note on Judgment in Default of Pleading, *ante*, p. 203. In *Gosset v. Campbell* (a) an action to recover possession of land and recovery of rent and mesne profits, two of the defendants made default in delivering defence, and interlocutory judgment was recovered against them on 30th June as follows: "It is this day adjudged that the plaintiffs do sign interlocutory judgment against the defendants R. Campbell and E. D. Lewis." On the 6th July Campbell and Lewis obtained an order to set aside the interlocutory judgment on payment of costs. This order had not been drawn up, and the costs had not been paid. Defendant Hargreaves had delivered defence. The action now came on for trial against Hargreaves, and on motion for final judgment against the two other defendants, of whom one contended that the interlocutory judgment was informal, and that he was not rightly brought into Court, the Vice-Chancellor held the interlocutory judgment was substantially correct, even if the form of such judgments had since been modified. At any rate Campbell and Lewis had made default in pleading, and had received notice of that application, and the only defendant who was not in default had abandoned his defence. The plaintiffs were therefore entitled to final judgment against all defendants with costs.

6. If the Plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in Rule 4.

[RULE VI.]

Where claim is for liquid demand and detention of goods or damages, plaintiff may enter final judgment and also interlocutory.

7. In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2, the plaintiff may

[RULE VII.]

In action for recovery of land.

(a) W. N. 1877, 134.

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[RULE VII.]

enter a judgment that the person whose title is asserted in writ of summons shall recover possession of the land, with his costs.

On this rule also see note on Judgment in Default of Pleading, *ante*, p. 203.

[RULE VIII.]

Where plaintiff has indorsed claim for mesne profits, &c.

8. Where the plaintiff has endorsed a claim for mesne profits, arrears of rent, or damages for breach of contract upon a writ for the recovery of land, if the defendant makes default as mentioned in Rule 2, or, if there be more than one defendant, some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants and proceed as mentioned in Rules 4 and 5.

On this rule also see note on Judgment in Default of Pleading, *ante*, p. 203. See also *Gosset v. Campbell* (a).

[RULE IX.]

In Probate action, if defendant in default, action may proceed.

[RULE X.]

In all other actions, if defendant in default, plaintiff may set down on motion for judgment.

9. In Probate actions, if any defendant make default in filing and delivering a defence or demurrer, the action may proceed, notwithstanding such default.

10. In all other actions than those in the preceding Rules of this Order mentioned, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to.

The numerous decisions on this rule have gone far to define its meaning. A defendant is not in default by non-delivery of statement of defence if no statement of claim have been delivered and notice waived (b). See on this rule also *Williams v. Cardwell* (c). As to motion for judgment see **O. XL., r. 1**, and notes.

Thus in an action by a mortgagee claiming sale and further relief, plaintiff asked for order for sale and order on defendants, if proceeds of sale should be insufficient to pay the difference, under the covenant to that effect in the mortgage deed. An order was made for sale without prejudice to the plaintiff taking any course he might think fit to adopt in the present action on giving notice to the defendant for the recovery of the balance of the mortgage debt, if any, by proceeding on the covenant (d). An action was brought claiming that the defendant might be decreed to execute a legal mortgage of hereditaments comprised in an

(a) W. N. 1877, 134, *ante*, p. 297.

(b) *Menton v. Metcalf*, W. N. 1877, 142; 46 L. J. Ch. D. 584; 36 L. T. N. S. 683; 21 S. J. 609.

(c) *Ante*, p. 260; W. N. 1877, 140; 25 W. R. 646.

(d) *Hall v. Snelling*, 20 S. J. 312; sub nom. *Hate v. &c.*, W. N. 1876, 77.

equitable mortgage, and render account, &c., and for foreclosure. The defendant had made default by not delivering defence or demurrer. The Vice-Chancellor held that the defendant having made default, the plaintiff was entitled to have decree on motion at once according to minutes prepared by the plaintiff (*a*). But in *Gillott v. Ker* (*b*), the Master of the Rolls held that admission by default of pleading would not properly come within **O. XL., r. 11**; but on default under this rule, **O. XXIX., r. 10**, the action may be set down, and this being done, may be tried in its turn in the ordinary way, and notice of motion be given in due course as pointed out in *Hall v. Snelling* (*c*). He thereupon made an order directing the clerk at the order of course seat in the Record and Writ Clerks' Office, to set down the action on motion for judgment upon an affidavit of default in delivering a defence or demurrer, and without any notice of motion (*b*). As to this case, it seems there must be some error in the report which we have given in substance as it appears, for first notice of motion is ordered to be given, and then there is a waiver of notice of motion by special order. The case seems in principle opposed to that shortly before cited of *Jenkins v. Davies* (*d*); for unless **O. XIX., r. 17** be overruled, it can hardly be said that an admission is not made, by default of pleading any denial of the facts alleged in the pleading of the plaintiff, or any objection to their truth; and **O. XL., r. 11** provides that a party may at any stage of an action apply for such order as he may upon *any* admissions of fact in the pleadings be entitled to, &c. As it stands, however, the case must be considered to limit the application of the principle of *Jenkins v. Davies* (*d*), and to exclude from a similar rule to that made in that case, viz., the application of **O. XL., r. 11**, all cases in which admissions are derived from default of pleadings. On application to Vice-Chancellor Hall for an order similar to that in *Walker v. Robinson* (*e*), to remove from a district registry to London an action for trial which the plaintiff is entitled to set down on motion for judgment under **O. XXIX., r. 10**, the Vice-Chancellor held it not proper to remove the action for that purpose, as further proceedings might be required to be taken in the district registry; but he directed the documents filed to be sent to London for the purpose of the hearing, and intimated that the action might be put in the paper for hearing without further direction (*f*). Where the action is in the district registry, and it is desired to take advantage of this rule, see further **O. XXXV., r. 13**, and notes.

If it be desired to hear a cause as short by consent of defendant without default, this rule may be taken advantage of (*g*).

By analogy to **O. XXXVI., r. 9**, Vice-Chancellor Hall, in *Lowndes v. Thomas* (*h*), directed ten days' notice to be given to the defendant to set down action on motion for judgment by default of pleading where the defendant was in default for want of answer, **O. XXIX., r. 40** being silent on the matter. But in *Roupell v. Parsons* (*i*), the same Judge seems to have held two days' notice sufficient. The Master of the Rolls, however, in *Hall v. Snelling* (*c*), dissented from *Roupell v. Parsons*, and seems to have confirmed *Lowndes v. Thomas*, though this is not distinctly apparent

(a) *Pearce v. Spickett*, W. N. 1876, 109; citing *Bowen v. Bowen*, W. N. 1876, 31; 24 W. R. 246; *Roupell v. Parsons*, W. N. 1876, 61; 34 L. T. N. S. 56; 24 W. R. 269; and *Hall v. Snelling*, *supra*.

(b) *Gillott v. Ker*, W. N. 1876, 116; 24 W. R. 428.

(c) 20 S. J. 312; sub nom. *Hate v. &c.*, W. N. 1876, 77.

(d) *Ante*, p. 296; 1 Ch. D. 696; 24 W. R. 690.

(e) W. N. 1875, 245; 33 L. T. N. S. 779; 24 W. R. 137.

(f) *Birmingham Waste Co. v. Lane*, W. N. 1876, 50; 24 W. R. 292.

(g) *Palin v. Brookes*, W. N. 1875, 188; 33 L. T. N. S. 322; 24 W. R. 20.

(h) 20 S. J. 272.

(i) W. N. 1876, 61; 34 L. T. N. S. 56; 24 W. R. 269.

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[RULE X.]

from the report, and the case does not seem to have been mentioned to him.

On application to proceed under this rule where interrogatories had been filed, but were unanswered, and an attachment could not be executed, Vice-Chancellor Hall ordered the case to be proceeded with by taking bill *pro confesso* under the old practice (a). In the *Provident Permanent Building Society v. Greenhill* (b), the bill had been filed in June, 1875, and duly served on the defendants, some of whom entered appearance. Interrogatories were afterwards served on all the defendants. One defendant entered no appearance and put in no answer. The motion was for directions how to continue the suit. The Master of the Rolls said this case is not like *Culley v. Buttifant* (a), for here the defendant was in default, not for want of answer, but for want of appearance. He ordered the suit to proceed under the new practice, *i.e.*, the plaintiff to proceed as if the defendant had appeared, O. XIII., r. 9, and then the defendant to deliver defence, and if not delivered in time, the plaintiff to set down the case on motion for judgment under O. XXIX., r. 10, on affidavit of default of defence, the bill to be taken as statement of claim. In *Woodhouse v. Blakeley* (c) the Master of the Rolls was moved for an order to take the bill *pro confesso*, under the old practice, against the defendant *H. Woodhouse* beyond the jurisdiction of the Court for whom appearance had been entered by the plaintiff under the old practice. An order for substituted service of interrogatories had been obtained and acted on, but no answer had been put in. The application was supported by the usual affidavit. The Master of the Rolls made the order. An order in *Gardiner v. Hardy* (d) referring to this rule may be referred to *ante*, p. 215.

When a defendant makes default in delivering defence, and the plaintiff has set down the action on motion for judgment under this rule, if all the parties are represented and consent, the matter may be disposed of on final order on motion day; but if, on the application, any party is not represented, or does not consent to hearing, the motion must remain in the general paper to be taken when reached in ordinary course (e). In the case of *Bridson v. Smith* (f), which was an action with reference to the construction of a will, a statement of claim had been delivered to four defendants, of whom only one had put in any statement of defence, and against him the plaintiff was in a condition to proceed under O. XL., r. 11, upon admissions in his pleadings. As to the other three, they admitted the allegations in the statement of claim, and the plaintiff wished to proceed against them by consent under the next rule, r. 11, but as there was a question of construction, it was important to get all parties before the Court together. Hall, V.-C., ordered the action to be set down on motion for judgment as against all the defendants who had not put in defence, and that plaintiff might be at liberty to give notice to the defending defendant of motion for judgment on the same day and time. On this rule the case of *Meakin v. Sykes* was set down (g). See also the case of *Fisher v. Hughes* (h); *Williams v. Cardwell* (i).

[RULE XI.]

11. Where, in any such action as mentioned in the last

(a) *Culley v. Buttifant*, 1 Ch. D. 84; 45 L. J. Ch. D. 200; 24 W. R. 55.

(b) 1 Ch. D. 624; 45 L. J. Ch. D. 272; 20 S. J. 271.

(c) 20 S. J. 292.

(d) *Gardiner v. Hardy*, W. N. 1876, 185.

(e) *Bowen v. Bowen*, W. N. 1876, 31; 24 W. R. 246.

(f) W. N. 1876, 103; 24 W. R. 392.

(g) 24 W. R. 293.

(h) *Post*, p. 350; 21 S. J. 478; 25 W. R. 528.

(i) *Ante*, p. 260; W. N. 1877, 140; 25 W. R. 646.

preceding Rule, there are several defendants, then, if one of such defendants make such default as aforesaid, the plaintiff may either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants.

On this rule also the case just above cited of *Bridson v. Smith* (a) is worthy of remark, as also the before mentioned case of *Parsons v. Harris* (b).

12. If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and the statement of fact in the pleading last delivered shall be deemed to be admitted.

In *Gillott v. Ker* the Master of the Rolls is stated to have held that a default by a defendant in pleading was not an admission within this rule (c).

In the case of *Earp v. Henderson*, the plaintiff stated an agreement whereby in consideration of the grant of a lease by the plaintiff to the defendant, defendant undertook, in the event of his selling the lease, to pay to the plaintiff half the purchase price, and then stated that the defendant had sold the lease for £500, and claimed that the defendant was trustee for him of £250, and might be ordered to account for and pay the same. Defendant admitted the agreement and the liability to account for half of his receipts, but said he had received but £350, out of which £39 were deducted for costs in another matter, and he paid £155 10s. into Court. The plaintiff, on the 10th February, delivered reply, joining issue on defence, and continuing thus: the plaintiff says that if the defendant only received £350, it was because Addison claimed from the defendant damages for breach of contract, and as a compromise of such claim the defendant allowed Addison to set off £150 in discharge of the liability of the defendant to the said Addison. Plaintiff on the 23rd February gave notice of trial. Defendant on the 16th June took out a summons that he might be at liberty to deliver joinder of issue upon reply, and the summons was adjourned into Court and came on for hearing with the trial of the action. The Vice-Chancellor held that the reply was not correct pleading, that the Court had power to enlarge the time, and allowed the summons. The plaintiff then elected to proceed with the trial on traverse of the defence, i.e., £350 was not the price, but the difference between the price and the set-off. The Vice-Chancellor held the form of the pleading erroneous, and that the plaintiff's case failed, and ordered the plaintiff to pay all costs except the costs of the summons, as to which no order (d). In the case of *Hall v. Eve*, the plaintiff stated an agreement between the defendants Eve and Whiffin, liquidators of a company, and Lane, a co-defendant, for a lease to the latter, with option to the lessee to

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[RULE XI.]

Where several defendants and one in default, plaintiff may set down on motion for judgment against defaulter at once, &c.

[RULE XII.]

If plaintiff fail to reply or demur, &c., when pleadings to be closed.

(a) W. N. 1876, 103; 24 W. R. 392.

(b) See *ante*, p. 260; W. N. 1877, 76; 25 W. R. 410.

(c) *Ante*, p. 299; cited in *Earp v. Henderson*, *infra*.

(d) 3 Ch. D. 254; 45 L. J. Ch. D. 738; 34 L. T. N. S. 844; see also *London and St. Katharine's Docks v. Metropolitan Railway Co.*, W. N. 1876, 272; 35 L. T. N. S. 733.

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[RULE XII.]

purchase; that Lane transferred his interest to the plaintiff, and shortly after gave notice to the first-named defendants of his intention to exercise his option of purchase for the plaintiff's benefit, and that the defendants, the liquidators, refused to convey, and he claimed specific performance. The defendants, by statement, set up a case that before the assignment to the plaintiff, Lane had committed a breach which gave them the right of entry. Plaintiff delivered reply on the 20th November, 1876, whereby he admitted certain paragraphs in the statement of defence, and denied others, and pleaded that if (which he did not admit, but denied) there had been any breach it had been waived; that if the second provision of the agreement had been broken by the plaintiff, the defendants were not entitled, by reason of such breach, to determine the agreement, for reasons which he stated. He alleged concealment and false representation, want of equity, part performance, and finally joined issue on statement of defence, except as before admitted, and with reply served notice of trial. Vice-Chancellor Bacon, in the first instance, set aside both reply and notice of trial as irregular, saying the plaintiff's case ought to have been made by amending his statement of claim (*a*); but this decision was reversed on appeal, and it was held that allegations of new facts necessary to support a plea in confession, and avoidance of any defence set up by defendant, may be stated in reply, and that the plaintiff may, in his reply, traverse, and also plead specially to each defence raised in the statement of defence (*b*).

[RULE XIII.]

If issue arise not between plaintiff and defendant, and one party to such issue fail in delivering any pleading, the other party may apply for such judgment as he may be entitled to.

[RULE XIV.]

Judgment by default may be set aside on terms.

13. In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Court or a Judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court may order judgment to be entered accordingly, or make such other order as may be necessary to do complete justice between the parties.

14. Any judgment by default, whether under this Order or under any of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit.

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ORDER XXX.

PAYMENT INTO COURT IN SATISFACTION.

[RULE I.]

Where action for debt or damages, defendant may pay into Court and plead payment into Court.

1. Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a Judge at any later time, pay into Court a sum of money by way of satisfaction or amends.

(*a*) *Hall v. Eve*, W. N. 1876, 282.

(*b*) *Hall v. Eve*, on appeal, 4 Ch. D. 341; 46 L. J. Ch. D. 145; 35 L. T. N. S. 926; 25 W. R. 177.

Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein.

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[RULE I.]

This rule, it has been held, does not permit a defendant in an action for nuisance, raising a question of title, to plead payment into Court, and to deny the plaintiff's right of action in respect of the same part of the statement of claim; and if he so pleads, the statement of defence will be amended as embarrassing under **O. XXVII., r. 1 (a)**.

2. Such sum of money shall be paid to the proper officer, who shall give a receipt for the same. If such payment be made before delivering his defence the defendant shall thereupon serve upon the plaintiff a notice that he has paid in such money, and in respect of what claim, in the Form No. 5 in Appendix (B.) hereto.

[RULE II.]

How payment
to be made.

Notice of pay-
ment to be
served.

The following order was issued November 12th, 1875 :—

“As money may now be paid into Court without leave at any time after service of the writ, and before defence (**O. XXX., r. 2**), summonses to stay on payment of a smaller sum than the sum demanded will no longer be issued. Instead thereof the amount shall be paid into Court, and the copy of the receipt sent to the plaintiff's solicitor.

“By order of the sitting Judge (*b*).

“Chambers.”

3. Money paid into Court as aforesaid may, unless otherwise ordered by a Judge, be paid out to the plaintiff, or to his solicitor on the written authority of the plaintiff. No affidavit shall be necessary to verify the plaintiff's signature to such written authority unless specially required by the officer of the Court.

[RULE III.]

Money paid in
may be paid
out to plaintiff
or his solicitor
on his
authority.

These are substantially the same rules as 15 & 16 Vict. c. 76, sect. 72, and **R. G. H., 1853, r. 11**.

A writ was issued for £373 balance of an account for work done and materials. On the 21st December, 1875, a Master's Order was made, that unless the parties agreed on an arbitrator, the cause should be referred to one of the Masters, “the costs of the cause to abide the event.” On 19th February, 1876, defendant paid £200 into Court, and gave notice in Form 5, Appendix B, “that that sum is enough to satisfy the plaintiffs' claim.” Shortly afterwards the plaintiffs took out the £200 under this rule, but did not give the notice in Form 6, Appendix B, or any other notice. On the 13th March, Pollock, B., made an order that the order of 21st December be varied, and that the cause be accordingly referred to the certificate of S.,

(a) *Spurr v. Hall*, 2 Q. B. D. 615.

(b) *W. N.* 1875, 201; 20 *S. J.* 56.

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[RULE III.]

under 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1852), s. 73, "the costs of the cause to abide the event." S. heard the reference and awarded on the 31st August that the £200 was enough to satisfy the plaintiffs' claim. On the 29th September defendants signed judgment for costs. On taxation, Master allowed the plaintiffs their costs against the defendants up to the time of taking the money out of Court, and thenceforward allowed the defendant costs against the plaintiffs. No pleadings were delivered on either side. Hawkins, J., having refused to make any order upon the defendant's summons to review the taxation, the case was brought on on appeal, and the Court held that as the plaintiffs had not taken the £200 out of Court in satisfaction, and given the notice under r. 4, which would have entitled them to their costs up to the time of taking the money out of Court, they were not entitled to any costs, and directed the Master to tax the defendant's costs against the plaintiffs', and disallow the plaintiffs' costs, observing that this decision was limited to the case, and they expressed no opinion what their decision would have been had the £200 been insulated by pleadings to any particular cause of action (a).

[RULE IV.]

Plaintiff may accept payment in satisfaction of cause in respect of which it is paid and give notice of acceptance.

4. The plaintiff, if payment into Court is made before delivering a defence, may within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered, then may before reply accept the same in satisfaction of the causes of action in respect of which it is paid in; in which case he shall give notice to the defendant in the Form No. 6 in Appendix (B.) hereto, and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and, in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed.

This is much to the same effect as part of the 73rd section of the Common Law Procedure Act, 1852.

Taking money out of Court no waiver of objections to other pleas.

No defence could be set up under this plea which would not be good under general issue.

Taking the money out of Court was and will be no waiver of objections to other pleas (b), nor any evidence against the plaintiff on other parts of his case (c).

It was held that no defence could be set up under a plea of payment of money into Court, which could not also be set up under the general issue. So if in an action for what was originally an entire money demand any part had been discharged as by payment (d), if it were not claimable by reason of illegality in the transaction; if not by a set-off, or if, in fact, the answer to any part of the claim were one which must have been specially pleaded, it was not admissible under this plea, nor, whatever the cause of action, could any matter be shown under this plea in mitigation of damages, which would be a bar to the whole action. So in an action for wrongful dismissal of a servant, the misconduct of the servant could not be shown (e), nor in an action for not granting a lease, knowledge

(a) *Langridge v. Campbell*, 2 Ex. D. 281; 46 L. J. Ex. D. 277; 36 L. T. N. S. 64; 25 W. R. 351.

(b) *Verbist v. De Keyser*, 3 D. & L. 392.

(c) *Gould v. Oliver*, 2 M. & G. 208.

(d) *Goldy v. Goldy*, 26 L. J. Ex. 29.

(e) *Speck v. Phillips*, 5 M. & W. 279.

by the plaintiff of the defective title of the defendant (*a*). But in the case of *Goldy v. Goldy* above mentioned (*b*) it was held that in a case of trover payment might be shown, as it goes merely in mitigation of damages.

It was formerly held that payment into Court of a smaller sum than that claimed could not be pleaded generally to the indebitatus counts (*c*), apparently because those counts being for a liquidated sum the plea alleged satisfaction by the payment of a smaller exact sum. If this were the reason it does not apply to the present common money counts, which do not claim a liquidated sum, but such pleas have been considered as liable to be disallowed, even in answer to the common money counts, and it was safer practice to plead them simply to so much of the claim in the declaration as they do cover, and to plead generally or specially to the residue of the claim. So such a plea could not be pleaded alone to any liquidated demand for a larger sum, as on action on a bond, covenant, bill of exchange, or the like, as the record showed that a larger amount was payable, and why the smaller amount should now suffice to cover it must be pleaded specifically (*d*); but in any action for unliquidated damages, payment into Court of any sum might be pleaded to the whole.

When other matters were pleaded they should stand first on the record (*e*), and the plaintiff ought to reply to them, although he accepted the money paid in, or the defendant was entitled to sign judgment of *non pros.* thereon (*f*). Thus the advantage of pleading in the form suggested above is seen where the action was on the money counts only, and claimed a sum larger than was really due, as was almost always the case, the plaintiff was compelled either to enter a *nolle prosequi* as to the residue, and pay the costs relating to it (*g*), or to go on for that residue at the risk of failing and having to pay all the costs of the cause, except the costs referring to the sum paid in; but he was entitled to those costs, including the costs of the replication, accepting the money, and of the taking it out of Court, whatever might be the result of the cause (*h*), as also to the costs of any issues found for him (*i*) though to no others. But if the plea of payment into Court were to the whole declaration, and the plaintiff replied damages *ultra*, the defendant was entitled to all the costs of the cause, including those of payment into Court, if the cause terminates in his favour in any way, *e.g.*, if he obtained judgment as in case of non-suit (*k*).

But by Rule 12 of R. G. H., 1853, this decision was invalidated in future, and whatever might be the result, the costs of the cause were given to the plaintiff in respect of the part of his claim admitted by payment into Court up to the time the money is paid in and taken out, and the defendant was only entitled in respect of his success as to the residue of the action, to the costs of the cause, in respect of such defence commencing at instructions for pleas but not before.

If after issue joined the defendant amended by paying money into

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[RULE IV.]

Payment into Court of smaller sum than amount of claim could not be pleaded to indebitatus counts.

Mode of pleading it.

Where other pleas.

Costs under R. G. H. 1853, Rule 12.

(*a*) *Robinson v. Harman*, 1 Ex. 850.

(*b*) *Goldy v. Goldy*, 26 L. J. Ex. 29.

(*c*) *Grimsley v. Parker*, 3 Ex. 610; see *contra*, *Jourdain v. Johnson*, 2 C. M. & R. 564.

(*d*) *Armfield v. Burgin*, 6 M. & W. 281; *Tattersall v. Parkinson*, 16 M. & W. 752; see *Finleyson v. Mackenzie*, 3 Bing. N. C. 824.

(*e*) *Coates v. Stevens*, 3 D. P. C. 784; 2 C. M. & R. 118.

(*f*) *Emmett v. Standen*, 3 M. & W. 497; *Topham v. Kidmore*, 5 D. P. C. 676; see *Goodee v. Goldsmith*, 2 M. & W. 202.

(*g*) *Goodee v. Goldsmith*, 2 M. & W. 202; *Williams v. Sharwood*, 3 Bing. N. C. 331; see *Harrison v. Watt*, 16 M. & W. 316.

(*h*) *Harrison v. Watt*, 16 M. & W. 316; *Rumbelow v. Whalley*, 16 Q. B. 397.

(*i*) *Clothier v. Gann*, 13 C. B. 220.

(*k*) *M'Lean v. Phillips*, 7 C. B. 817.

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[RULE IV.]

When costs
should be
taxed.Where actions
consolidated.Sum taken out
'recovered'
under County
Courts Acts.

Court, and the plaintiff continued the action and failed, he was not entitled to any more costs but such as related exclusively to the sum paid in, and the defendant was entitled to all the other costs subsequent to the original instructions for pleas, those words meaning the technical item in a bill of costs which occurs but once at a particular stage of the cause (*a*). If the plaintiff amended and the defendant then paid money into Court, which the plaintiff accepted, the defendant was entitled to the costs of the abortive proceedings (*b*).

Where money was paid in and taken out in satisfaction of a part of a demand, the plaintiff, it seems, might tax his costs as to that part at once (*c*); but if there were issues as to the other parts he could not tax them until they were decided in his favour, or the whole taxation was set aside (*d*).

By Rule R. G. H. 1853, r. 13, where money was paid into Court in several actions which were consolidated, and the plaintiff, without taxing costs, proceeded to trial on one and failed, he was still entitled to costs on the others up to payment of money into Court.

It was holden that after plea of payment into Court the defendant could not enter a suggestion to deprive the plaintiff of costs either on the ground of the sum paid in being under £40 (*e*) or under a Court of Requests Act (*f*); but a sum paid in and taken out in satisfaction was held to be "recovered" within the County Courts Acts, so as to deprive a plaintiff of costs in those cases in which he would be deprived of them if he had recovered the same sum by judgment (*g*).

Of course the effect of the plea or statement of payment of money into Court as an admission of the cause of action is precisely in the same condition as formerly.

The r. 4 of this order is subject to O. LV (which see), and plaintiff may, for sufficient reason, be deprived of his costs notwithstanding the terms of the rule (*h*).

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ORDER XXXI.

DISCOVERY AND INSPECTION.

It may be well before annotating the rules of this order to give a summary of the practice on these subjects in the various Courts before the passing of these Acts.

17 & 18 Vict.
c. 125, s. 51.

By 17 & 18 Vict. c. 125, s. 51, it was enacted that in all causes in any of the superior Courts by order of the Court, or a Judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them, by leave of the Court or a Judge, may at any other time deliver to the opposite party, or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon

(*a*) *Harold v. Smith*, 5 H. & N. 381.

(*b*) *Wilton v. Snook*, 12 M. & W. 805; 1 D. & L. 964; *Jackson v. Nunn*, 4 Q. B. 209.

(*c*) See per Parke, B., in *Harrison v. Watt*, 16 M. & W. 317.

(*d*) *Cauty v. Gyll*, 4 M. & G. 907.

(*e*) *Farrent v. Morgan*, 3 D. P. C. 792; 2 C. M. & R. 252; sub nom. *Tarrent v. Morgan*.

(*f*) *Jorden v. Berwick*, 9 M. & W. 3.

(*g*) *Parr v. Lillicrap*, 1 H. & C. 615; 32 L. J. Ex. 150; *Boulding v. Tyler*, 3 B. & S. 472; 32 L. J. Q. B. 85; overruling *Chambers v. Wiles*, 24 L. J. Q. B. 267.

(*h*) *Broadhurst v. Willey*, W. N. 1876, 21; 20 S. J. 240.

such matter), interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days, to answer the questions in writing by affidavit to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which discovery may be sought within the above time, or such extended time as the Court or a Judge shall allow, shall be deemed to have committed a contempt of the Court, and shall be liable to be proceeded against accordingly.

This enactment was held enforceable against a public officer, plaintiff for a banking Company, though the Company was no corporation, and being merely a nominal plaintiff was argued not to be the opposite party within the section (a), and it was held to apply to causes where there was no declaration or plea owing to there being no pleadings, *e.g.*, causes of interpleader (b) and of ejectment (c). Interrogatories might under it have been administered to a plaintiff and foreigner, and out of the jurisdiction (d); but it has been held that in a petition of right there was no application of s. 50 of 17 & 18 Vict. c. 125, and it would seem for the same reason there was no application under the same circumstances of s. 51 of the same Act either (e).

A party was held entitled to discovery of all that was material to his own case, though it might be material also to his adversary's, so it is no objection if the interrogatories are calculated to draw information advancing the case of the interrogator, that the answers must disclose the case of the answerer. Thus, in an action against a broker, interrogatories asking whether he acted as principal or agent in the transaction under discussion, and if as agent, then the name of his principal, were allowed (f). So in a case where barley had been consigned by A. to B., and delivered by the defendants, the shipowners, to B. without production of the bill of lading, the plaintiffs, B.'s bankers, sued on the bill of lading three months afterwards, B. having in the interval become bankrupt. On the defendants' affidavit suggesting that the bill of lading had been indorsed to the plaintiffs after the delivery of the barley to B., or that they, having the bill of lading in their possession, knowingly suffered the defendants to deliver the barley to B., the Court allowed interrogatories under this section to be administered to the plaintiffs, as to the time and circumstances under which the bill of lading had been indorsed to them (g), distinguishing the case of *Finney v. Forwood* (h), in spite of strong argument that the interrogatories went solely to compel the plaintiffs to disclose their case; and in actions against attorneys, surveyors, and the like, for negligence, they may be asked what steps they took in the business entrusted to them (i). Where an action was on an alleged contract, it was held in Chancery that the defendants were entitled to discovery of matters alleged by them negating any contract (k), the same discovery was allowed under the section in question at Common Law. So in an action

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Party entitled
to discovery of
all material to
his own case
though
material to his
adversary's
also.

(a) *McKewan v. Rolt*, 4 H. & N. 738.

(b) *White v. Watts*, 12 C. B. N. S. 267.

(c) *Flitcroft v. Fletcher*, 11 Ex. 543; see *Finney v. Forwood*, 1 L. R. Ex. 6; *Derby Commercial Bank v. Lumsden*, L. R. 5 C. P. 107.

(d) *Pohl v. Young*, 25 L. J. Q. B. 23.

(e) *Thomas v. The Queen* (2), L. R. 10 Q. B. 44.

(f) *Thöl v. Leask*, 10 Ex. 704.

(g) *Derby Commercial Bank Limited v. Lumsden*, L. R. 5 C. P. 107.

(h) L. R. 1 Ex. 6.

(i) *Whateley v. Crowter*, 5 E. & B. 709; 25 L. J. Q. B. 163, *sub nom.* *Whateley v. Crawford*, *Carew v. Davies*, *ibid.*

(k) *Glascott v. Copper Miners of England*, 11 Sim. 305.

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But case must
be already set
up; interroga-
tories will not
be allowed to
fish out a case.

Plaintiff was
entitled to dis-
covery of what
would repel
defendant's
case.

Party not
entitled to
discovery of
matter solely
relating to
adversary's
case.

Instances.

for commissions on the sale of goods, defendants were entitled to discovery of matters negating the plaintiff's claim (a).

In an action for a malicious prosecution on a charge of obtaining money under false pretences, the false pretences being that the plaintiff had disbursed certain sums of money for the defendant's wife, the defendant was allowed to interrogate respecting money transactions of the plaintiff with the defendant's wife, and the circumstances under which he introduced himself to her, but not respecting a box of plate alleged to have been received by him from her, as this was irrelevant to the issue (b). There must, however, be a specific case already set up; interrogatories were not allowed before declaration to discover whether the plaintiff had any cause of action (c).

It has been held in a late case, but on principles, which were as good before the passing of the Acts as since, that interrogatories which are merely irrelevant will be disallowed and struck out (d).

A plaintiff was entitled not only to discovery of what constituted his own title, but of what would repel the case, or what he expected would be the case of the defendant, though not otherwise common to the case of both (e). Thus, where the defence was a composition deed under the Bankruptcy Act, 1861, the plaintiff was allowed to interrogate upon matters as to the parties suggesting the deed, the trustees, its execution by the defendant and the trustees, and the means by which its execution by the creditors was obtained in order to show it was fraudulently concocted (f), there can hardly be a doubt that, at least in cases where it is in a manner accidental which party is plaintiff and which defendant, as in an interpleader issue, the like power of discovery from the plaintiff would be given to a defendant.

A defendant was entitled to discovery, to enable him to determine what sum he should pay into Court (g).

But one party is not entitled to discovery of matters relating exclusively to the case of his antagonist (h), "the statute was not meant to apply so as to enable one party, by means of interrogatories, to discover how the other intends to shape his own case, and to see whether there are any defects in it of which he may avail himself (i).

In an action for an injury to the plaintiff, by the negligence of the defendant, the latter was not allowed to interrogate, as to the circumstances or time of the accident, the persons present, the extent of the injury, or the amount of medical attendance (k), though it seems the two last-named questions were material to him to know, in order to estimate how much damages he ought to offer to pay (l). In an action of trover by assignees of a bankrupt for bills, interrogatories asking the plaintiffs what case they intended to set up, and on what grounds they claimed the bills, whether as having been received after notice of an act of bank-

(a) *Rew v. Hutchins*, 10 C. B. N. S. 829; see also *Hunt v. Hewitt*, 7 Ex. 236.

(b) *Zychlinaker v. Maltby*, 10 C. B. N. S. 838.

(c) *Anon. v. Parr*, 13 W. R. 337.

(d) *Mansfield v. Childerhouse*, 4 Ch. D. 82; 46 L. J. Ch. D. 30; 35 L. T. N. S. 590; 25 W. R. 68.

(e) *Att.-Gen. v. Corporation of London*, 2 Mac. & Gord. 247.

(f) *Bayley v. Griffiths*, 1 H. & C. 429; 31 L. J. Ex. 477; *Goodman v. Holroyd*, 15 C. B. N. S. 839; see also *Bartlett v. Lewis*, 12 C. B. N. S. 249; 31 L. J. C. P. 230; see *Villeboisnet v. Tobin*, L. R. 4 C. P. 184.

(g) *Wright v. Goodlake*, 13 W. R. 349; 34 L. J. Ex. 82; but see also *Jourdain v. Palmer*, L. R. 1 Ex. 102; *Horne v. Hough*, L. R. 9 C. P. 135.

(h) *Moor v. Roberts*, 2 C. B. N. S. 671.

(i) Per Cockburn, C. J., 2 C. B. N. S. 679.

(k) *Peppiat v. Smith*, 33 L. J. Ex. 239.

(l) See *Zarifi v. Thornton*, 26 L. J. Ex. 214.

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Ejectment.

ruptcy, or as having been given by way of fraudulent preference, or on any other, and what ground, were disallowed, though the defendants swore they did not know what acts of bankruptcy were relied on, nor how they could be made liable (a); but in *Flitcroft v. Fletcher* (b), the Court of Exchequer allowed the defendant to interrogate the plaintiffs in what character they claimed, whether as heirs-at-law, or grantees of any and what person claiming to be heir-at-law of one F., and through what links in either case they traced the heirship, and whether they had any other and what right or interest in the premises; but this case was one of ejectment, in which there were no pleadings, and the Court may have thought that no more was sought than would in any other action have been disclosed on the declaration, and than the defendant was entitled to know, in order to defend his own possession. That which seems to have by some been thought to be the doctrine of Courts of Equity, that a plaintiff is entitled to know what is the defendant's case, and how he makes it out, but not to see the proofs on which it rests (c), has been doubted by the Court of Queen's Bench (d), and by the Common Pleas (e). In the case above mentioned of *Flitcroft v. Fletcher*, the defendant had been long in possession, and was totally ignorant of the plaintiff's title and circumstances, which did not occur in either of the cases last cited, the application in each of them being supported only by the common affidavit, and it has been held in the Court of Exchequer that the plaintiff in ejectment cannot put such questions to a defendant (f); but he may ask whether another person is not real defendant (g). In *Adams v. Lloyd* also, the Court of Exchequer seemed to think in an action of trespass for entering and taking minerals from the plaintiff's land, the defendant having set up a title through one P., under whom the plaintiff also derived title, that the defendant might have asked the plaintiff whether he claimed under a conveyance from P. anterior to that under which the defendant claimed (h).

Whether plaintiff entitled to know what is defendant's case though not how he makes it.

In deciding on the nature of the discovery granted under this section, the Courts of Law were guided by the same principles as Courts of Equity (i), but were governed by different rules of practice; it was said by Willes, J., in *Bartlett v. Lewis* (k), that the form of the section expressly excludes the difficulties which so frequently arose in Courts of Equity, as to whether an objection of the nature raised in that case should be made on demurrer, or come by way of answer, and that by the section the party is put in the position of a witness; but the practice has not been uniform in some cases, and interrogatories have been allowed, though the answers might tend to criminate the answering party (l), or render him liable to forfeiture (m), and it has been said that he must take his objection

Principles formerly guiding Courts of Common Law same as those governing Courts of Equity; practice different.

(a) *Edwards v. Wakefield*, 6 E. & B. 462.

(b) 11 Ex. 543.

(c) See per Lord Cottenham in *Att.-Gen. v. Corporation of London*, 2 Mac. & Gord. 247.

(d) See *Edwards v. Wakefield*, 6 E. & B. 462.

(e) *Stoate v. Rew*, 14 C. B. N. S. 209; *Pearson v. Turner*, 16 C. B. N. S. 157.

(f) *Horton v. Bott*, 2 H. & N. 249.

(g) *Sketchley v. Conolly*, 11 W. R. 573.

(h) 3 H. & N. 351-366.

(i) *Whateley v. Crowter*, 5 E. & B. 713; *Horton v. Bott*, 2 H. & N., 253; *Edwards v. Wakefield*, 6 E. & B. 462.

(k) 12 C. B. N. S. 263; see *Villeboisnet v. Tobin*, L. R. 4 C. P. 184; *Edmunds v. Greenwood*, L. R. 4 C. P. 70.

(l) *Osborn v. London Dock Co.*, 10 Ex. 698; *Bartlett v. Lewis*, 12 C. B. N. S. 249.

(m) *Chester v. Wortley*, 17 C. B. 410; *contra*, per Parke, B., *May v. Hawkins* 11 Ex. 210.

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Objection will not hold to interrogatories, the answer to which will show determination of interest by force of limitations;

Interrogatories must be relevant; but relevancy not always sufficient ground for allowing them.

in his answer on oath, while in some cases the interrogatories were disallowed (a). Under the new rules, it seems, by reference to r. 5, *post*, the practice is for the party objecting to answer, to apply by summons to Chambers, to have the interrogatory struck out. The last of these cases, *Villeboisnet v. Tobin* (b), seems to lead to the true rule in these cases, which seems to be that it requires that some special circumstances should be shown which render the interrogatories, the answers to which may criminate the answerer, proper to be put, but they will not, in the absence of such circumstances, be allowed. If, however, the circumstances show that the interrogatories put are *bonâ fide*, and not put for the purpose merely of criminating the answerer, they will be allowed (c), and the answerer allowed to take the objection on oath in his answer. But if on oath he states that further answer may subject him to forfeiture, he would not be forced to answer further (d); but the objection to answers causing a forfeiture does not extend to a case where the answers will merely show the determination of an interest by force of a limitation (e). And where a man had held himself out as a broker, and induced another to deal with him as such, he might, in a suit in equity for an account, be compelled to answer as to all his dealings with his customer, though his answer might subject him to penalties for acting as broker in the City of London, without having been admitted under 57 Geo. 3, c. 60 (f). The ground of these decisions was that a man by becoming broker to another contracted to render him a full account of his dealings in that character, and that whether such account should expose him to penalties or not. In an action for the infringement of a patent, the infringement being admitted, it was held no ground for refusing interrogatories that the answers of the defendants might expose his customers to actions (g).

The interrogatories should be confined to matters relevant to the case set up, and to such as would be evidence in the action (h). But the materiality of the interrogatories would not always suffice to make them admissible; it was required to be shown that they were exhibited for other reasons than merely to make costs, wherefore questions which the person interrogated could not in reason be supposed to be able to answer, save by denying knowledge, being disallowed by a Judge, the Court refused to alter his order (i); and it seems under this rule that interrogatories by defendant may be allowed, going to the amount of damages (k). In an action for commission on a particular contract between the defendants and A., the defendants were not allowed to ask respecting the terms of other contracts entered into with them by the plaintiff, either for A. or

(a) *Baker v. Lane*, 34 L. J. Ex. 57; see *Villeboisnet v. Tobin*, L. R. 4 C. P. 184; *Edmunds v. Greenwood*, L. R. 4 C. P. 70; *Orme v. Crockford*, 13 Pr. 376; *Chadwick v. Chadwick*, 1 W. R. 29.

(b) L. R. 4 C. P. 184.

(c) *Bickford v. Darcy*, L. R. 1 Ex. 354; *McFadzen v. Mayor of Liverpool*, L. R. 3 Ex. 279; *Greenfield v. Reay*, L. R. 10 Q. B. 217; see *Edmunds v. Greenwood*, L. R. 4 C. P. 70; *Hill v. Campbell*, L. R. 10 C. P. 222; and under new practice, *Society of Apothecaries v. Nottingham*, W. N. 1875, 259; 20 S. J. 161; but see now *Atherley v. Harvey*, 2 Q. B. D. 524; 46 L. J. Q. B. D. 518; 36 L. T. N. S. 551; 25 W. R. 727; *ante*, p. 49.

(d) *Pye v. Butterfield*, 34 L. J. Q. B. 17.

(e) *Pye v. Butterfield*, 34 L. J. Q. B. 17.

(f) *Robinson v. Kitchin*, 21 Beav. 365; 8 D. M. & G. 88; *Green v. Weaver*, 1 Sim. 404.

(g) *Tetley v. Easton*, 18 C. B. 643.

(h) *Edwards v. Wakefield*, 6 E. & B. 462; see *Morris v. Bethell*, L. R. 4 C. P. 765.

(i) *Bechervain v. Great W. Railway Co.*, L. R. 6 C. P. 36.

(k) *Zarifi v. Thornton*, 26 L. J. Ex. 214.

other persons (*a*); and in an action against A. and B. as acceptors of a bill of exchange, A. having pleaded that it was accepted by B. in the partnership name of A. and B. in fraud of A., and not for partnership purposes, interrogatories asking whether A. was ever in partnership with B., and inquiring generally into the dealings of the partnership, were disallowed (*b*).

It has been held that the Court has a general discretion as to allowing interrogatories to be put, and where it was clear that the defendant would not be bound to answer many of them, the Court refused to allow them to be administered (*c*); and in an action of slander the Court refused leave to the plaintiff to interrogate the defendant whether he had not spoken the words charged, or any other, and what words, conveying similar imputations, and when, where, and to whom he spoke them (*d*). But in another case, also in action for slander, it being shown that the defendant had at a certain place, and in presence of certain persons, made slanderous imputations against the plaintiff, as to which the persons present refused to give the plaintiff particulars, the Court allowed interrogatories to be put to the defendant as to the precise words which he had used (*e*).

The object of interrogatories is to afford to the interrogator information upon matters peculiarly within the knowledge of the party interrogated, which may assist the interrogator in making his case not to try the cause on admissions of the party interrogated, nor to break down the case set up by him. Thus matters of fact only should be asked, not matters of law (*f*), and though within the boundaries thus defined, the party interrogated holds the position of a witness, yet such a character is no further imposed on him; so though, as already shown, interrogatories were allowed in one case to be put by defendant as to conversations between the plaintiff and an agent of the defendant (*g*), yet in another case questions upon matters known to the interrogated party only through his agents, and equally within the knowledge of the agents of the interrogator, were not allowed (*h*). So interrogatories on mere matters of cross-examination were disallowed (*i*), and interrogatories for the purpose of contradicting a written instrument (*k*).

It is submitted that notwithstanding or rather in addition to the provisions for the discovery of documents under s. 50 of 17 & 18 Vict. c. 125, to be mentioned in reference to rr. 5 and 6 of this order, an interrogatory might be put under this section as to the possession by the party interrogated, of documents relating to the case of the interrogator, sufficient to ascertain the existence and description of the document without a knowledge of which access to or inspection of it under s. 50 could not be obtained (*l*), but such an interrogatory should be confined to documents relating to the case of the interrogator (*m*), and, under s. 50, inspection can clearly not be obtained (*n*), nor can the contents be inquired

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Object of interrogatories.

Interrogatory as to possession of documents.

When inspection not obtainable under section 50.

(*a*) *Rew v. Hutchins*, 10 C. B. N. S. 829; see *Zychlinaker v. Maltby*, 10 C. B. N. S. 838.

(*b*) *Robson v. Crawley*, 2 H. & N. 766.

(*c*) *Tupling v. Ward*, 6 H. & N. 749; *Baker v. Lane*, 34 L. J. Ex. 57; see *Atkinson v. Fosbroke*, L. R. 1 Q. B. 628.

(*d*) *Stern v. Sevastopulo*, 14 C. B. N. S. 737.

(*e*) *Atkinson v. Fosbroke*, L. R. 1 Q. B. 628.

(*f*) See *Whately v. Crawford*, 25 L. J. Q. B. 165; per *Ld. Campbell, C. J.*

(*g*) *Rew v. Hutchins*, 10 C. B. N. S. 829.

(*h*) *Bird v. Malzy*, 1 C. B. N. S. 308.

(*i*) *Rew v. Hutchins*, 10 C. B. N. S. 829.

(*k*) *Moor v. Roberts*, 2 C. B. N. S. 671.

(*l*) *Rew v. Hutchins*, 10 C. B. N. S. 829.

(*m*) *Adams v. Lloyd*, 3 H. & N. 351.

(*n*) *Scott v. Zygomala*, 4 E. & B. 483

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practice.Form of in-
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liver, how
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former law.Time for appli-
cation.

for (a) except where a *prima facie* case is made that the document itself is lost (b), and in such a case a condition was imposed that the answers should not be given in evidence unless ground were established for the admission of secondary evidence.

If a party in answer admit the possession of documents, but state on oath that they relate exclusively to his own case, he need give no description of them (c).

But under the present practice, in a suit relating to land, even where the defendant denied the plaintiff's title and set out fully his own, it was held he must in his affidavit of documents specify in detail all the documents in his possession relating to the subject-matter of the suit, although he state that these documents related exclusively to his own title, and do not aid the plaintiff's case, and although he may not be compellable to produce them at the hearing. "A bundle of documents, relating exclusively to my own title," was held not a sufficient description, although the defendants swore that the documents in question would not tend to help the plaintiff's case (d): however, in the case of *Taylor v. Oliver*, the defendant in the schedule to his affidavit of documents had given the dates and no further particulars of a long list of deeds which he declined to produce on the ground that they were his title deeds relating exclusively to his own property and not to any property of the plaintiff; that they related exclusively to and were intended to be used in his defence, and did not in any way relate to the plaintiff's case, nor contain anything which could impeach the defence or support the plaintiff's case. The Vice-Chancellor held that as the deeds were sufficiently identified the plaintiff was entitled to no further discovery as to the contents or names of the parties thereto (e).

In form, interrogatories should be concise and simple (f), for, if irrelevant or prolix, they might be altogether disallowed on application for leave to deliver them, though some might be free from objection (g), they were entitled in the Court and in the cause and numbered consecutively.

Application for leave to deliver them was made to the Court or to a Judge in Chambers, and in general should have been made to the Judge; if made to the Court the rule was *nisi* only (h), the Court only determining the general principle, leaving the form and the particular interrogatories for Chambers (i). So whether a particular interrogatory should be allowed or not was matter for the discretion of the Judge, with which the Court would not in general interfere, unless the Judge were shown to be clearly wrong; and thus though special circumstances ought to have been shown to the Judge before he should have allowed certain interrogatories to be put, yet the circumstances in the case seeming sufficiently special, and there being no proof that the necessary matters had not been put before him, the Court refused to interfere by disallowing the interrogatories (k). A copy of the proposed interrogatories should be served on the opposite party with the rule *nisi* or summons.

The proper time for applying was by the plaintiff at or after declaration, and by the defendant at or after plea (l), and without special circum-

(a) *Herschfield v. Clarke*, 11 Ex. 712, per Alderson, B.

(b) *Wolverhampton Waterworks Co. v. Hawksford*, 5 C. B. N. S. 703.

(c) *Adams v. Lloyd*, 3 H. & N. 351.

(d) *Fortescue v. Fortescue*, 34 L. T. N. S. 847; 24 W. R. 945.

(e) W. N. 1876, 241; 34 L. T. N. S. 902.

(f) *Hustler v. Freeland*, 2 N. R. 396.

(g) *Robson v. Crawley*, 2 H. & N. 766; *Tupling v. Ward*, 6 H. & N. 753; *Phillips v. Lewin*, 34 L. J. Ex. 37.

(h) *Thöl v. Leask*, 10 Ex. 704. (i) *Zarifi v. Thornton*, 26 L. J. Ex. 214.

(k) *Inman v. Jenkins*, L. R. 5 C. P. 738.

(l) *Croomes v. Morrison*, 5 E. & B. 984; *Jones v. Pratt*, 6 H. & N. 697; *Anon. v. Parr*, 13 W. R. 337.

stances (a) an earlier application would not be entertained, but a later might be made without any special circumstances by either party (b). By s. 52 of the Common Law Procedure Act, 1854, the application for such order shall be made upon an affidavit of the party proposing to interrogate, and his attorney or agent, or in the case of a body corporate of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defence upon the merits, and if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay; provided that where it shall happen from unavoidable circumstances that the plaintiff or defendant cannot join in such affidavit, the Court or a Judge may, if they or he think fit, upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit.

If the party sues or defends in person, an affidavit by him alone was sufficient (c). If the application were by the plaintiff, he must swear he had a good cause of action upon the merits (d), and if made before declaration, the affidavit should show what the cause of action was, in order that the Court or Judge might determine as to the relevancy of the proposed interrogatories (e); so if made before plea by defendant the special circumstances should be brought before the Court by affidavit (f).

The costs were in the discretion of the Court or the Judge hearing the application, and if no order were made as to them, they were not costs in the cause (g).

The answers should not be general but specific to each interrogatory (h).

The party might set up any matter which privileged him from answering, but could not by denying the other party's case relieve himself from answering any interrogatories relevant to that case. So in an action for money had and received to recover the price of goods alleged to have been consigned to the defendant for sale, the defendant admitted by some of his answers the receipt of the goods, but refused to give the names of the persons to whom he had sold them or the terms of the sales, alleging, that he had purchased them of the plaintiff; he was held bound to give these particulars (i). But where a party, sued as administrator, admitted an Irish administration, but denied that he had taken out administration in England or meddled with the intestate's effects in England, there being no affidavit in reply, the Court refused to compel him to answer further (k), and a demurrer was allowed to a bill for discovery on the ground that it appeared by the bill that the cause of action had arisen more than six years before (l).

If a plaintiff fail to answer, the trial will sometimes be postponed, and either party may, for failure to answer without just cause, be proceeded against by attachment as on a contempt of Court, but, unless on a strong case, where the Court sees that the omission to answer has really been contumacious, the attachment was usually ordered to lie in the office for a

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c. 125, s. 52.

Affidavit in support of application.

Costs.

Answers.

Party interrogated cannot avoid answering by denying case of questioner.

Attachment for not answering.

- (a) *Martin v. Hemming*, 10 Ex. 478.
- (b) *James v. Barnes*, 17 C. B. 596.
- (c) *Oxlade v. The N. E. Railway Co.*, 12 C. B. N. S. 350.
- (d) *May v. Hawkins*, 11 Ex. 210.
- (e) *Croomes v. Morrison*, 5 E. & B. 984.
- (f) *Martin v. Hemming*, 10 Ex. 478.
- (g) *Smith v. Great W. Railway Co.*, 6 E. & B. 405.
- (h) *Chester v. Wortley*, 18 C. B. 239.
- (i) *Geary v. Buxton*, 29 L. J. Ex. 280.
- (k) *Swift v. Nun*, 26 L. J. Ex. 365.
- (l) *Smith v. Fox*, 6 Ha. 386.

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Remarks.*17 & 18 Vict.
c. 125, s. 53.Extent of
application of
section.

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Sect. 56.

Sect. 57.

week to give time for answering (a), and has been altogether refused (b). The rule for an attachment was of course only *nisi* (c).

Section 53 of the Common Law Procedure Act, 1854, provided that, in case of omission without just cause to answer sufficiently such written interrogatories, it shall be lawful for the Court or a Judge, at their or his discretion, to direct an oral examination of the interrogated party as to such points as they or he may direct before a Judge or Master, and the Court or Judge may, by such rule or order, or any rule or subsequent order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination and the costs of the application, and of the proceedings thereon, and otherwise, as to such Court or Judge shall seem just. This section only applied, it seems, either where there is no answer (d), or the answer is ambiguous and without any supposed good defence; for even though the supposed defence is not really good, the supposition of its validity suffices to render this section inapplicable (e). The application for examination, if made to the Court, could only obtain a rule *nisi* (f), and in every case must be promptly made (g).

By s. 54, such rule or order shall have the same force and effect, and may be proceeded upon in like manner, as an order made under the 1 Wm. 4, c. 22, an Act for providing for the examination of witnesses under orders of Court, in which s. 5 provided for punishment by process of contempt of a witness disobeying the order to attend for examination on proof of service of the order of the Court, and the notice by the person to take the examination of the appointment of time and place for holding it.

By s. 55, whenever, by virtue of this Act, an examination of any witness or witnesses has been taken before a Judge of one of the said superior Courts, or before a Master, the depositions taken down by such examiner shall be returned to and kept in the Master's office of the Court in which the proceedings are pending; and office copies of such depositions may be given out, and the depositions may be otherwise used in the same manner as in the case of depositions taken under the before-mentioned Act, 1 Wm. 4, c. 22.

By s. 56, it shall be lawful for every Judge or Master named in any such rule or order as aforesaid for taking examinations under this Act, and he is hereby required to make, if need be, a special report to the Court in which such proceedings are pending touching such examination, and the conduct or absence of any witness or other person therein or relating thereto; and the Court is hereby authorised to institute such proceedings and make such order and orders upon such report as justice may require and as may be instituted and made in any case of contempt of the Court.

By s. 57, the costs of every application for any rule or order to be made for the examination of witnesses by virtue of this Act, and of the rule or order and proceedings thereon, shall be in the discretion of the Court or Judge by whom such rule or order is made.

It has before been remarked if no order be made on the costs in any of these proceedings, they do not become costs in the cause (h).

(a) *Geary v. Buxton*, 29 L. J. Ex. 280.

(b) *Von Hoff v. Hoerster*, 27 L. J. Ex. 299; *Windle v. Lane*, 29 L. J. Ex. 245. In this case the answers being ready at the time for showing cause, costs were made costs in the cause.

(c) See per Martin, B., in *Von Hoff v. Hoerster*, 27 L. J. Ex. 299.

(d) *Turk v. Syne*, 27 L. J. Ex. 54.

(e) Per Bramwell, B., *Walker v. Olding*, Jan. 30, 1862, cited in Lush's Pr., 3rd ed., vol. ii. p. 859.

(f) *Turk v. Syne*, 27 L. J. Ex. 54. (g) *Chester v. Wortley*, 18 C. B. 239.

(h) *Smith v. Great W. Railway Co.*, 6 E. & B. 405.

In Chancery discovery could always have been had by the plaintiff to the whole of the matters alleged in his bill, provided they were matters which ought to be alleged in the bill. The grounds of objection to the discovery were as given in Daniell's Chancery Practice. 1. That the discovery may subject the defendant to pains and penalties or to forfeiture, or something in the nature of forfeiture. 2. That in conscience the defendant's right is equal to the plaintiff's. 3. That the discovery sought is immaterial to the relief prayed. 4. That the discovery would be a breach of professional confidence. 5. That the discovery relates only to the defendant's case. 6. That a third party has an interest in the discovery and ought not to be prejudiced. 7. That the discovery would be prejudicial to public interests.

In fact, all these grounds are equally good grounds of defence at Common Law, and several of them we have already noticed, *e.g.*, the first, third, fifth. As to the second it has not occurred at law, because, from its nature, cases involving it have not hitherto occurred in Courts which were purely Common Law Courts; but as all Courts are now Divisions of the High Court of Justice, each having Equity jurisdiction, this ground of defence may occur in any of them. It was a principle of equity that if a defendant had in conscience as good a title to property in his possession as that of the person who sought to deprive him of it, though he might want a perfect legal title, the Court would not compel him to give to the plaintiff any assistance to the defeasance of his own title. This point most commonly arose where the defendant was a purchaser for value without notice of the plaintiff's claim (*a*). Upon the same ground a jointress might in many cases demur to a bill filed against her for a discovery of her jointure deed if the plaintiff was unable or did not by his bill proffer to confirm her jointure (*b*). Indeed in the case last cited discovery was refused till it had actually been confirmed.

As to the fourth ground before mentioned there can be little doubt that it would in a Court of Common Law be as good a ground for refusing discovery if sought as in a Court of Equity, and the scarcity of cases on it probably arises from the fact that the practice was on this head so well established in Chancery before the power of giving discovery was introduced at Common Law, which was only in the year 1854, that discovery has under the statutory enactments at Common Law rarely been sought in a case where this protection could be pleaded. There are some cases, however, at Common Law on the point, which may be looked to, confirming the same view as the equity cases (*c*). The rule extends as to the client to all *confidential* communications which have passed between him and his legal advisers, or persons acting as the agents of such legal advisers, which class may comprise even the client himself after he has consulted his lawyer, but cannot be extended to the case of ordinary agents however confidential (*d*), with reference to the subject-matter of the cause in

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Grounds of
objection to
discovery in
Chancery.

Second cause
not heretofore
occurring at
Common Law,
but now may
occur in any
Division.

Fourth ground
as good at law
as in equity.

Confidential
communica-
tions be-
tween client
and adviser.

(a) Mitford Pl. 199; *Jerrard v. Saunders*, 2 Ves. jr. 458; see *Sweet v. Southcote*, 2 Br. C. C. 66.

(b) Mitford Pl. 199; *Chamberlain v. Knapp*, 1 Atk. 52; *Senhouse v. Earl*, 2 Ves. Sr. 450; *Leech v. Trollop*, *ib.* 662.

(c) *Cossey v. London, Brighton, and South Coast Railway Co.*, L. R. 5 C. P. 146, distinguishing *Baker v. London and S. W. Railway Co.*, which see, L. R. 3 Q. B. 91; also *Chartered Bk. of India v. Rich*, 4 B. & S. 73; 32 L. J. Q. B. 300; *Skinner v. Great Northern Railway Co.*, L. R. 9 Ex. 298; and *Wooley v. N. London Railway Co.*, L. R. 4 C. P. 602; *Mahoney v. National Widows' Life Assurance Fund*, L. R. 6 C. P. 252; *Bustros v. White*, 1 Q. B. D. 423; 45 L. J. (App.) Q. B. D. 642; 34 L. T. N. S. 835; 24 W. R. 721.

(d) *Ross v. Gibbs*, L. R. 8 Eq. 522; *Anderson v. The Bank of British Columbia*, 2 Ch. Div. 644; 45 L. J. Ch. D. 449; 35 L. T. N. S. 76; 24 W. R. 624, 724.

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Confined to
information
given by client.

Extended to
unprofessional
agents if made
with a view of
legal proceed-
ings pending or
impending.

hand (a). The full meaning and modifications of these words will be found by examination of the cases cited; but we think that the principle of them all will be found to be shortly expressed as above (b). As to the adviser the protection is not qualified by any reference to the cause in hand, or any particular proceedings (c); in fact, the privilege is that of the client, not of the adviser, who is protected from disclosing the secret for fear of injury to the client, and it extends only to information actually received professionally in the course of business and during the existence of the professional relation (d), and only to information or communications given or made by the client; for if information be acquired by a solicitor from other sources, though for the purpose of his client's interest, in his character as solicitor, which he never would have obtained otherwise, it is not privileged (e). The privilege was formerly held to extend only to counsel and solicitors or persons engaged between them and their clients as media of communication (f); but it has been extended to all communications made confidentially, even to unprofessional agents, if made with a view of actually pending or impending legal proceedings under the instructions of a solicitor with a view to such proceeding (g), and has

(a) *Garland v. Scott*, 3 Sim. 396; *Bolton v. Corporation of Liverpool*, *ib.* 467-487; see principle of this case, and of *Hughes v. Biddulph*, 4 Russ. 190, discussed; *Minet v. Morgan*, L. R. 8 Ch. 361; *Bacon v. Bacon*, W. N. 1876, 96; S. C. 42 L. J. Ch. 627; 28 L. T. N. S. 573; *Mostyn v. West Mostyn Coal Co.*, 34 L. T. N. S. 531; see also *Pearse v. Pearse*, 1 D. G. & Sm. 12; *Lawrence v. Campbell*, 4 Drew. 485; *Bolton v. Corporation of Liverpool*, 1 M. & K. 88-93; *Hughes v. Biddulph*, 4 Russ. 190; *Woods v. Woods*, 4 Ha. 83-86; *Jenkins v. Bushby*, 2 L. R. Eq. 547; *Talbot v. Marshfield*, 2 Dr. & Sm. 549; *Boyd v. Petrie*, 17 W. R. 903; see also *Richards v. Jackson*, 18 Ves. 472; *Vent v. Pacey*, 4 Russ. 193; *Greenough v. Gaskell*, 1 M. & K. 98-101; *Walsham v. Stainton*, 2 H. & M. 1; *Nicholl v. Jones*, 2 H. & M. 588; see also *Paddon v. Winch*, L. R. 9 Eq. 666; *Clagett v. Phillips*, 2 Y. & C. C. C. 82-86; *Combe v. Corporation of London*, 1 Y. & C. C. C. 631-650; *Holmes v. Baddeley*, 1 Ph. 476, 480; *Lord Walsingham v. Goodricke*, 3 Ha. 122; *Radcliffe v. Fursman*, 2 Br. P. C. 514; *Mornington v. Mornington*, 2 J. & H. 697.

(b) See *English v. Tottie*, 1 Q. B. D. 141; 24 W. R. 393.

(c) *Cromack v. Heathcote*, 2 B. & B. 4; *Greenough v. Gaskell*, 1 M. & K. 101-102; *Herring v. Clobery*, 1 Ph. 91; *Carpmael v. Powis*, 1 Ph. 687-692; see *Re Cameron's Coalbrook, &c., Railway Co.*, 25 Beav. 1-4; *Pearse v. Pearse*, 1 D. G. & Sm. 12; *Nias v. Northern and Eastern Railway Co.*, 3 M. & Cr. 355-357.

(d) *Greenough v. Gaskell*, 1 M. & K. 98-104; *Walker v. Wildman*, 6 Mad. 47; *Desborough v. Rawlins*, 3 M. & C. 515; *Lewis v. Pennington*, 8 W. R. 465; *Cutts v. Pickering*, 1 Vent. 197; *Wilson v. Rastall*, 4 T. R. 753; *Morgan v. Shaw*, 4 Mad. 54, 56, 57.

(e) *Ford v. Tennant*, 32 Beav. 162; *Re Land Credit Society of Ireland*, 15 W. R. 703; see *Gore v. Bowser*, 5 D. G. & Sm. 30-33.

(f) *Duchess of Kingston's Case*, 11 Harg. St. Trials, 243; 20 How. St. Tr. 572; *Greenough v. Gaskell*, 1 M. & K. 98; *Vaillant v. Dodemead*, 2 Atk. 524; *Wilson v. Rastall*, 4 T. R. 753; *Lloyd v. Freshfield*, 2 C. & P. 325; *Rothwell v. King*, *Spencer v. Luttrell*, *Stanhope v. Nott*, 2 Sw. 221, n.; *Du Barry v. Livette*, Peake, N. P. C. 77, 78, explained 4 T. R. 756; *Parkins v. Hawkshaw*, 2 Stark. 239; *Reid v. Langlois*, 1 Mac. & Gord. 627-638; *Russell v. Jackson*, 9 Ha. 387; *Goodall v. Little*, 1 Sim. N. S. 155; *Hooper v. Gumm*, 2 J. & H. 602; *Taylor v. Foster*, 2 C. & P. 195; *Foote v. Hayne*, 1 C. & P. 545.

(g) *Ross v. Gibbs*, L. R. 8 Eq. 522; *Anderson v. Bank of British Columbia*, 2 Ch. Div. 644; 45 L. J. Ch. D. 449; 35 L. T. N. S. 76; 24 W. R. 624, 724; see also *Cossey v. London, Brighton, and S. C. Railway Co.*, L. R. 5 C. P. 146; *Wooley v. North London Railway Co.*, L. R. 4 C. P. 602; see also *Fenner v. The London and S. E. Railway*, L. R. 7 Q. B. 767; *Skinner v. The Great Northern Railway Co.*, L. R. 9 Ex. 298; *McCorquodale v. Bell*, 1 C. P. D. 471; 45 L. J. C. P. D. 329; 34 L. T. N. S. 261; 24 W. R. 399; but see *Bustros v.*

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Privilege extends to representatives of person entitled to it against third parties.

When privilege once attaching does not cease.

Distinction between protection to client and adviser.

been refused even where relating to legal proceedings and of a legal character where confidential communication was not claimed as the ground of privilege (*a*). It was long since held to apply to a money scrivener (*b*), but his business was in fact part of the business of an attorney; but it did not apply to conveyancers (*c*), nor to persons consulted as attorneys who were not in fact so (*d*). The privilege has been held to extend to the representatives of the person originally entitled to it as against third parties, but does not apply as between different claimants under him (*e*).

Privilege once arising does not cease upon the solicitor afterwards becoming interested himself in the matter of the suit (*f*), nor upon his being struck off the rolls (*g*). It is to be observed that the distinction taken, and to some extent allowed, between the privilege of the client and that of the adviser, or rather the protection from discovery, to the client and that to the adviser, has by no means been acquiesced in placidly (*h*), and the later cases, though not decisive, seem to tend to assimilate the protection in the two classes of cases (*i*); in matters of title the decisions seem to have gone the full length of identifying the protection (*k*), extending that of the client where that of the adviser would have been allowed. It has not, with the exception before mentioned, viz., confidential communication between principal and agent in the matter of the communication with a view to the matter of the suit, been extended beyond legal advisers; even communications between co-parties in a suit relative to their defences are not privileged (*l*), nor even will it extend to

White, 1 Q. B. D. 423; 45 L. J. (App.) Q. B. D. 642; 34 L. T. N. S. 835; 24 W. R. 721; and *Martin v. Butchard*, 36 L. T. N. S. 732.

(*a*) *Smith v. Daniell*, L. R. 18 Eq. 649; see also *Wooley v. North London Railway Co.*, L. R. 4 C. P. 602; *Mahoney v. National Widows' Life Assurance Fund*, L. R. 6 C. P. 252; as to sufficient claim of privilege, see *Macfarlane v. Rolt*, L. R. 14 Eq. 580.

(*b*) *Harvey v. Clayton*, 2 Sw. 221, n.

(*c*) *South Sea Co. v. Doliffe*, referred to in *Vaillant v. Dodemead*, 2 Atk. 525; and see *Turquand v. Knight*, 2 M. & W. 100.

(*d*) *Fountain v. Young*, 6 Esp. 113; but see *Calley v. Richards*, 19 Beav. 401-404.

(*e*) *Russell v. Jackson*, 9 Ha. 387; *Gresley v. Mousley*, 2 K. & J. 288; *Tugwell v. Hooper*, 10 Beav. 348-350, as to privilege from forfeiture, see *Parkhurst v. Lowten*, 1 Mer. 391-402; also *Steele v. Stewart*, 1 Ph. 471-475; *Lafone v. Falkland Islands Co.*, 4 K. & J. 34; *Chartered Bank of India, &c., v. Rich*, 4 B. & S. 73; 32 L. J. Q. B. 300; *Fenner v. London and South E. Railway Co.*, L. R. 7 Q. B. 767; but see *Bustros v. White*, 1 Q. B. D. 423; 45 L. J. (App.) Q. B. D. 642; 34 L. T. N. S. 835; 24 W. R. 721; *Walsham v. Stainton*, 2 H. & M. 1; *Kerr v. Gillespie*, 7 Beav. 572; *Lawrence v. Campbell*, 4 Drew, 485; *Bunbury v. Bunbury*, 2 Beav. 173-176; *Simpson v. Brown*, 33 Beav. 482; *Churton v. Frewen*, 2 Dr. & Sm. 390; see *Page v. Ward*, 17 W. R. 435.

(*f*) *Chant v. Brown*, 7 Ha. 79.

(*g*) *Lord Cholmondeley v. Clinton*, 19 Ves. 268.

(*h*) See *Pearse v. Pearse*, per K. Bruce, V.-C., 1 De G. & Sm. 12-26; *Thompson v. Falk*, per Kindersley, V.-C., 1 Drew, 21-25.

(*i*) *Nias v. N. & E. Railway Co.*, 3 M. & C. 355-357; *Bunbury v. Bunbury*, 2 Beav. 173; *Flight v. Robinson*, 8 Beav. 22-23; *Maden v. Veervers*, 7 Beav. 489; *Woods v. Woods*, 4 Ha. 83; *Reece v. Trye*, 9 Beav. 316; *Pearse v. Pearse*, 1 De G. & Sm. 12; *Tugwell v. Hooper*, 10 Beav. 348; *Penruddock v. Hammond*, 11 Beav. 59; *Beadon v. King*, 17 Sim. 34; see *supra*, *Reid v. Langlois*, 1 Mac. & Gord. 627; *Follett v. Jefferyes*, 1 Sim. N. S. 1; *Warde v. Warde*, 3 Mac. & Gord. 365; *Balguy v. Broadhurst*, 1 Sim. N. S. 111; *Hawkins v. Gathercole*, 1 Sim. N. S. 150; *Goodall v. Little*, 1 Sim. N. S. 155; *Thompson v. Falk*, 1 Drew, 21; *Bluck v. Galsworthy*, 2 Gif. 453; *Ford v. Tennant*, 32 Beav. 162; *Boyd v. Petrie*, W. N. 1869, 181, 17 W. R. 903.

(*k*) *Manser v. Dix*, 1 K. & J. 451; *Pearse v. Pearse*, 1 D. G. & Sm. 12.

(*l*) *Whitbread v. Gurney*, Younge, 541; *Goodall v. Little*, 1 Sim. N. S. 155;

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Solicitor cannot, on any such ground, refuse information to Court to enable it to regain possession of its ward.

Sixth and seventh ground of objection equally effectual at law and in Equity.

Procedure formerly different at law and in Equity.

No intervention of Court to allow interrogatories in Equity.

legal advisers if it is in reference to a fraud with which the party is charged, for it is not a solicitor's duty to aid in a fraud or in concealing a fraud (*a*), and, indeed, this seems the rule wherever the communications are with reference to effecting any illegal purpose (*b*); but where it is desired in any case of this kind to prevent the privilege attaching, it is necessary to make a clear case connecting the discovery sought with the fraudulent or illegal act complained of (*c*). Nor is a solicitor privileged to refuse information to the Court which may enable it to recover possession of any of its wards on any ground of the interest of his client (*d*).

As to the sixth ground of objection, this, it is submitted, if the facts occurred to raise it, would be allowed in Common Law as strongly as in Equity. If a party not before the Court would necessarily be prejudiced by the production of a document, which the party possessing it had no grounds to urge on his own behalf for not producing, the Court would yet not call on him to produce it without having the person who might be prejudiced by its production before it (*e*). The case most frequently arose when the party interrogated, or called on to produce some instrument, was trustee for another. It has been held that a mortgagee could not be compelled to show the title of his mortgagor unless the latter were before the Court (*f*); but the more proper course for taking the objection would be to apply for the bringing of the absent party before the Court.

The seventh ground, if it exist, would clearly be as good at law as in equity. On this ground it was held that correspondence between the Court of Directors of the East India Company and the Board of Control could not be discovered without injury to public interest, and the discovery was refused (*g*).

The procedure was, however, altogether different at law and in equity. We have already given the form of it at common law; in equity it was an old jurisdiction of the Court, and there it was given without any application for leave to administer interrogations. Formerly the interrogatories were a part of the bill, but by 15 & 16 Vict. c. 86, that arrangement was altered by the omission of the interrogating part of the bill, and liberty was given to the plaintiff to file interrogatories for the examination of any of the defendants within eight days from the time limited for the defendant's appearance, and serve the defendant with an office copy of them within eight days from his appearance. Thus, unless the defendant took some action, there was no intervention of the Court needful to allow interrogatories; the present practice, in this respect, stands on the footing of that of the old Court of Chancery. Again it may be observed that in case of an objection for irrelevancy the onus is,

Glyn v. Caulfield, 3 Mac. & Gord. 463-474; *Betts v. Menzies*, 3 Jur. N. S. 885; 5 W. R. 767; *Reynolds v. Godlee*, 4 K. & J. 88; *Anderson v. The Bank of British Columbia*, 2 Ch. D. 644; 45 L. J. Ch. D. 449; 35 L. T. N. S. 76; 24 W. R. 624, 724.

(*a*) *Follett v. Jefferyes*, 1 Sim. N. S. 1; *Russell v. Jackson*, 9 Ha. 387; *Gilbert v. Lewis*, 1 De G. J. & S. 38, 49, 50; *Feaver v. Williams*, 11 Jur. N. S. 902; *Phillipps v. Holmer*, 15 W. R. 578; see *Reynell v. Sprye*, 11 Beav. 618.

(*b*) *Russell v. Jackson*, 9 Ha. 387.

(*c*) *Follett v. Jefferyes*, 13 Jur. 972; *Mornington v. Mornington*, 2 J. & H. 697; *Charlton v. Coombes*, 4 Gif. 372-382.

(*d*) *Ramsbottom v. Senior*, 8 L. R. Eq. 575; *Burton v. Earl of Darnley*, 8 L. R. Eq. 576, n. 1.

(*e*) *Murray v. Walter*, Cr. & Ph. 114; *Morrell v. Wootten*, 13 Beav. 105; *Reid v. Langlois*, 1 Mac. & Gord. 627; see also *Bethell v. Casson*, 12 W. R. 200.

(*f*) *Lambert v. Rogers*, 2 Mer. 489, but see *Balls v. Margrave*, 3 Beav. 448, 4 Beav. 119; *Few v. Guppy*, 13 Beav. 457; *Gough v. Offley*, 5 De G. & S. 653; *Hercy v. Ferrers*, 4 Beav. 97.

(*g*) *Smith v. East India Co.*, 1 Ph. 50-55; *Wadeer v. East India Co.*, 8 De G. M. & G. 182; *S. C.*, sub nom. *Rajah of Coorg v. East India Co.*, 29 Beav. 300; 25 L. J. Ch. 345.

by these rules, thrown on the interrogating party to show the relevancy, not on the objector to show the irrelevancy, for the Judge if not satisfied that the interrogatory is relevant, may disallow it. The mode of objecting to the insufficiency as well as to some other faults in an answer in Chancery was by means of exceptions to the answer; but as exceptions have been entirely abolished by these rules, it is not necessary here to go into the practice upon that form of proceeding. In this matter the practice of the Common Law tribunals has been adhered to rather than that of Chancery.

In Chancery, however, originally the power of interrogation was in the plaintiff alone, but it was conceived that this might sometimes not work full justice, for which reason, by 15 & 16 Vict. c. 86, s. 19, it was provided that: "It shall be lawful for any defendant in any suit, whether commenced by bill or by claim, but in suits commenced by bill which the defendant is required to answer not until after he shall have put in a sufficient answer to the bill (a) and without filing any cross bill of discovery, to file in the record office of the said Court interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subjects on which a discovery is sought, and to deliver a copy of such interrogatories to the plaintiff or his solicitor, and such plaintiff shall be bound to answer such interrogatories in like manner as if the same had been contained in a bill of discovery filed by the defendant against him on the day when such interrogatories shall have been filed, and as if the defendant to such bill of discovery had on the same day duly appeared; and the practice of the Court with reference to excepting to answers for insufficiency or for scandal shall extend and be applicable to answers put in to such interrogatories; Provided that in determining the materiality or relevancy of any such answer or of any exception thereto, the Court is to have regard in suits commenced by bill to the statements contained in the original bill, and in the answer which may have been put in thereto, by the defendant exhibiting such interrogatories for the examination of the plaintiff, and in suits commenced by claim to the statements therein, and in any affidavits which may have been filed either in support thereof or in opposition thereto; Provided also that a defendant, if he shall think fit so to do, may exhibit a cross bill of discovery against the plaintiff, instead of filing interrogatories for his examination.

At common law the right to claim production of documents was gradually developed; in the earliest rules of pleading, whenever a party claimed by virtue of a deed alleged in his pleading, he must have made what was called *profert* of the deed, and the other party had then a right to *crave oyer*, which was originally to have the deed read out in Court, but when written pleading came into full use, to be allowed inspection of the original deed and be furnished with a copy. This practice continued till the Common Law Procedure Act of 1852, which by s. 55 abolished *profert* and *oyer*, and by s. 56 enacted that: "A party pleading in answer to any pleading in which any document is mentioned or referred to shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out." Up to this the deed of which *oyer* was craved became on being set out part of the pleading of the party who had made *profert* of it, and if the *oyer* showed a weakness in his case it opened his pleading to demurrer: this was changed by the enactment (b). A craver of *oyer* formerly stopped all proceedings of the op-

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Practice allows Discovery without leave.

Discovery allowed to defendant, 15 & 16 Vict. c. 86, s. 19.

Gradual development of right to production at Common Law.

Profert abolished, 15 & 16 Vict. c. 76, ss. 55, 56.

Profert made deed set out part of pleading.

(a) This rule no longer holds under the Judicature Acts. Discovery now is allowed in certain cases to defendant even before statement of defence is filed, and to plaintiff even in some cases before appearance entered; see r. 11, and 20 S. J. 81.

(b) *Sim v. Edmunds*, 15 C. B. 240.

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Remarks.

Stay of proceedings till probate taken. Court orders production of all deeds and written instruments in hands of party, material to the other party's case on the merits.

Party seeking production must have been party in fact or interest to instrument.

Where made evidence document ordered to be produced.

ponent until complied with ; and even since the Act, the Court has stayed proceedings until the plaintiff who sued in the character of executor had taken out probate and given notice of it to the defendant (*a*), and inspection may be obtained of any deed of which the opposite party would formerly have had to make profert (*b*). Besides this, the Court would, between the parties, order the production of all deeds and written instruments in the hands of one party or his attorney (*c*) which it was needful the other should see or have copies of or have stamped in order to his pleading (*d*) or maintaining his own case (*e*), that is, to his pleading on the merits, for it was refused where it was only to enable him to plead in abatement the nonjoinder of other parties (*f*), nor where the application was merely a fishing application to discover whether the opposite party was able to produce such a document or no (*g*). Where forgery has been alleged, the production of the deed by its possessors has been ordered for inspection in their hands by the accusing party sued on the instrument (*h*).

The party seeking production under these rules must have been a party to the instrument either in fact or in interest ; so where plaintiff sued for breach of a contract to take him into partnership, and it appeared that draft articles of partnership had been settled by the attorneys of both parties, but the engrossment varying from the draft, the plaintiff had refused to execute it, inspection and copy of the engrossment were refused him, though he was held entitled to copy of the draft (*i*), and on an action for breach of contract in not employing plaintiff as sub-editor of a newspaper, the defence being that he had wrongfully lent himself to the insertion of a garbled report of a trial, inspection and copies of the report were refused him as he had no interest in it (*k*). So the plaintiff, founding his application on an affidavit, in which he stated that an agreement which he expected would be set up by the defendant was, if it bore his plaintiff's name, a forgery, his application was refused (*l*), the agreement not being the subject-matter of the cause, and not having been actually set up. So the plaintiff, having been nonsuited in an action against the defendant, whom he sued as a partner, because, on production of the partnership deed it was not stamped, the Court refused an application at his suit on a second trial to have it produced to be stamped, as he was no party, and not interested in the deed (*m*). But where on a former trial one party had produced an instrument, the other party was on the second trial held entitled to inspection of it (*n*), but not for the purpose of moving for a new trial (*o*), and where a document has in fact been made evidence in a cause, being verified by affidavit, the document itself may be ordered to be produced (*p*). When in trover for a horse and harness, the

(*a*) *Webb v. Atkins*, 14 C. B. 401.

(*b*) *Penarth Harbour, &c., Co. v. Cardiff Waterworks*, 7 C. B. N. S. 816.

(*c*) *Neale v. Swind*, 2 C. & J. 278 ; see *Vale v. Oppert*, L. R. 10 Ch. 340.

(*d*) *Beale v. Bird*, 2 D. & R. 419.

(*e*) *Doe d. Child v. Roe*, 1 E. & B. 279.

(*f*) *Beale v. Bird*, 2 D. & R. 419.

(*g*) See *Shadwell v. Shadwell*, 6 C. B. N. S. 679.

(*h*) *Thomas v. Dunn*, 6 M. & G. 274 ; see also *Woolmer v. Devereux*, 2 M. & G. 758 ; *contra*, *Hildyard v. Smith*, 1 Bing. 451 ; *Chetwynd v. Marnell*, 1 B. & P. 271 ; see also *Threlfall v. Webster*, 1 Bing. 161.

(*i*) *Radcliffe v. Bleasby*, 3 Bing. 148.

(*k*) *Powell v. Bradbury*, 4 C. B. 541.

(*l*) *Jessel v. Millingen*, 1 M. & Scott, 605.

(*m*) *Taylor v. Osborne*, cited 4 Taun. 159.

(*n*) *Hewitt v. Pigott*, 7 Bing. 400.

(*o*) *Pratt v. Goswell*, 9 C. B. N. S. 706.

(*p*) *Tebbutt v. Ambler*, 7 D. P. C. 674 ; *Attenborough v. Clark*, 2 H. & N. 588.

defendant pleaded that they had been sold under a distress for rent against a third party, and it appeared that such party had signed an agreement allowing the defendant to keep his possession of the distress after the five days, the plaintiff was not allowed copy of the agreement or inspection of it (*a*); and in an action on a charter-party, inspection by the defendant of the log-book was not allowed (*b*); and in an action by an indorsee of a bill, a sworn broker, against acceptor, the defendant alleging the bill to be an accommodation bill, and to have been indorsed for differences in stock-jobbing transactions, inspection of plaintiff's books was refused (*c*).

But where the defendant had given a written authority to another to announce to the holders of the notes of a bank that he would support the bank with a certain sum of money, and the plaintiff claimed as holder of some of the notes, which on the faith of this notice he had forborne to present, he was entitled to have the authority produced in order to get it stamped as claiming interest therein (*d*); and in ejectment for forfeiture by breach of covenants in a lease, a party not denied to be in lawful possession was allowed inspection of the lease, though it did not appear how he was in possession under it (*e*).

In actions on policies of assurance, it is usual to require the plaintiff to deliver to the assurers on affidavit copies of all letters, papers, &c., in his possession, in any way relating to the matter of the policy (*f*). Where an action was brought by the owner of a ship against the proprietor of goods on board for contribution in respect of a general average, defendant was allowed to inspect and take copies of the general average loss statement, but not of the documents from which it was drawn up (*g*).

In actions by allottees of shares against provisional committeemen to recover deposits, the plaintiffs were allowed to inspect and have copies of the subscribers' agreement and parliamentary contract (*h*), and in an action by a secretary of a company against a provisional committeeman for salary, defendant was allowed to inspect and take copies from the minute book containing resolutions referred to in plaintiff's particulars (*i*), though a similar order was refused to a defendant in an action by a company for calls (*k*).

The adverse party must hold the document upon a trust express or implied to produce it when necessary for the use of the party demanding it, hence, if only one copy have been made of an instrument between parties, and that is the one of which inspection is sought, it is always granted (*l*), but not if a duplicate or counterpart have been made, though the party applying has lost it (*m*); and in one case a testator had perished at sea, and a duplicate copy of the charter party on which his executor was suing perished with him, the Court refused to order the defendant to give a

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Where party
claims interest.

In actions on
policies.

In actions by
allottees of
shares against
provisional
committee.

Where party
holds document
on trust for
production.

Not if dupli-
cate or counter-
part.

(*a*) *Lawrence v. Hooker*, 5 Bing. 6.

(*b*) *Rundle v. Beaumont*, 4 Bing. 537; see also *Rowe v. Howden*, *ib.*, 539, n.; *Smith v. Winter*, 6 D. P. C. 386.

(*c*) *Pritchett v. Smart*, 7 C. B. 625.

(*d*) *Bateman v. Phillips*, 4 Taunt. 157.

(*e*) *Doe d. Child v. Roe*, 1 E. & B. 279.

(*f*) *Goldschmidt v. Marryat*, 1 Camp. 562.

(*g*) *Twizell v. Allen*, 5 M. & W. 337.

(*h*) *Steadman v. Arden*, 15 M. & W. 587; *Ley v. Barlow*, 1 Ex. 800.

(*i*) *Shaw v. Holmes*, 3 C. B. 952.

(*k*) *Birmingham, &c., Railway Co. v. White*, 1 Q. B. 282.

(*l*) *Stevens v. Berwick*, 4 D. P. C. 277; *Jones v. Palmer*, *ib.* 446; *Devenoge v. Bouverie*, 8 Bing. 1; *Goodliff v. Fuller*, 14 M. & W. 4; *Doe v. Slight*, 1 D. P. C. 163; *Gigner v. Bayly*, 5 Mo. 71; *Bluck v. Gompertz*, 7 Ex. 67; *Mayor of Arundel v. Holmes*, 8 D. P. C. 118; *Price v. Harrison*, 8 C. B. N. S. 617; *Owen v. Nickson*, 30 L. J. Q. B. 125; *Stone v. Strange*, 13 W. R. 350.

(*m*) *Travis v. Collins*, 2 C. & J. 625; *Lord Portmore v. Goring*, 4 Bing. 152.

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Where but one
copy of deed
making out ad-
versary's case.

Rule not con-
fined to instru-
ments *inter*
partes.

Where purpose
of production
was to have
instrument
stamped.

No objection
that others
were interested
in document.

copy (a); so in one of the cases above referred to, in an action for breach of promise of marriage, inspection was allowed to defendant of his letters to the plaintiff (b), but in another action for the like cause, letters written by plaintiff to defendant, and returned by the latter, were not ordered to be produced by plaintiff, so as to give inspection of them to defendant (c). On the ground that there was no trust, and that a party is not bound to produce his title deeds, the Court refused, in an action for trespass, where the plaintiff claimed under a conveyance from an ancestor of the defendant, to compel him to produce or give to the plaintiff a copy of the deed (d).

But if the title-deed make out the case of the applicant, and there is but one copy, an inspection may be ordered (e). In an action against the Marshal for an escape of a party committed on a *habeas corpus*, the defendant was ordered to give a copy of the *habeas* to enable plaintiff to frame his declaration (f).

The rule was by no means confined to instruments *inter partes*; it extended to bills, notes, and other securities (g); and wherever the instrument is relied on in a pleading, whether it was set out, or the fact of its existence was shown, the other party was entitled to inspection (h); so where action was for money had and received on the sale of a book, under an agreement to share profits, though the agreement was not declared on, the defendant was entitled to an inspection of it (i). Where the defendant pleaded want of an agreement in writing under the Statute of Frauds, and the plaintiff replied that there was such an agreement, defendant was held entitled to see it (k). Nor was it necessary that an instrument, *inter partes*, should have been executed by the opposite party. Where plaintiff sought to recover damages on an agreement to take him into partnership, defendant was ordered to give plaintiff inspection, and a copy of the partnership deed in his possession, which had been executed by the plaintiff, but not by him (l), and where the plaintiff, assignee of a bankrupt, sued B. in respect of contracts alleged to have been entered into with him on behalf of the bankrupt and him on a joint account, it was held that he was entitled to inspect the books of the bankrupt to see what the contracts were (m).

Where the object of production was to have the instrument stamped, the former existence of a counterpart or duplicate was no objection if it was lost (n), but such applications have for some time become absolutely unnecessary, as by the Common Law Procedure Act, 1854, s. 29, instruments might be stamped at the trial.

It was no objection to an order for inspection that other persons not parties to the action were interested in the document (o). So in an action for salary by a secretary against a provisional committeeman of a company, defendant was allowed to inspect the minute-book, the Court not being satisfied that it was not in the plaintiff's control (p); and in an

(a) *Street v. Brown*, 6 Taunt. 302; see *Woodcock v. Worthington*, 2 Y. & J. 4.

(b) *Stone v. Strange*, 13 W. R. 350.

(c) *Goodliff v. Fuller*, 14 M. & W. 4.

(d) *Pickering v. Noys*, 1 B. & C. 262; see also *Hodgson v. Warden*, 1 D. & L. 286.

(e) See *Doe v. Langford*, Bail Ct. Ca. L. & M. 37; 21 L. J. Q. B. 217.

(f) *Fox v. Jones*, 7 B. & C. 732.

(g) See *Bluck v. Gompertz*, 7 Ex. 67.

(h) *Price v. Harrison*, 8 C. B. N. S. 617.

(i) *Charnock v. Lumley*, 5 Scott, 438.

(k) *Blogg v. Kent*, 6 Bing. 614.

(l) *Morrow v. Saunders*, 1 B. & B. 318.

(m) *Whitbourne v. Pettifer*, 4 M. & Scott, 182.

(n) *Neale v. Swind*, 2 C. & J. 278.

(o) *Plant v. Kendrick*, L. R. 10 C. P. 692.

(p) *Shaw v. Holmes*, 3 C. B. 952.

action by an allottee of shares against a member of a provisional committee, the plaintiff was allowed inspection of the subscribers' agreement and the parliamentary contract in the hands of the solicitor of the company (a).

The form for obtaining an order under this jurisdiction was to apply in the first instance at Chambers, the summons being supported by an affidavit showing that the instrument was in the possession of the other party, that the applicant could not safely proceed without seeing it, and such other facts as would bring the case within the rules above stated. The expense of the inspection and the copy must be borne by the party seeking them, but he was not in general charged with the costs of the application where he had first asked for inspection and been refused (b). No such application could be made before action brought (c), and if made after plea the order would be no stay of proceedings (d).

The power of the Common Law Courts to grant inspection was greatly enlarged by 14 & 15 Vict. c. 99, s. 6, which, while leaving the former powers of the Courts in that respect undiminished, enabled them in all proceedings (e) before them to order inspection wherever a discovery might have been obtained in Equity. The documents, of which inspection might be sought under this section, must be relevant to the action, and the case must have been one in which discovery could have been had in Equity (f). So inspection was refused to demandant in dower of a deed of her deceased husband conveying the land on which the claim was made to a *bonâ fide* purchaser for value, without notice, on the ground that in such a case discovery would have been refused in Equity (g). For this reason also the documents must be pertinent to the case of the applicant, for otherwise he could not in Equity have discovery of them. So where an action had been brought by a corporation for dues, and the defendant alleged that they had no title to the dues, and that they had in their possession certain documents relating thereto, which would show they had no such title, and the corporation admitted possession of the documents showing their title to the dues, but denied the defendant's allegation that these showed they had no title, it was held that the defendant had no title to inspect them, for being the title-deeds of the corporation, they could not prove his case otherwise than by showing some defect in the title of the plaintiffs (h). On the same principle, in an action against a manager of a branch bank of the plaintiffs for alleged breaches of an agreement relating to the management, inspection was refused to the defendant, of correspondence between officers of the company after the dispute had begun, containing inquiries as to the breaches of duty charged, and the answers to them, and specifying the evidence which could be adduced; the Court holding that such inspection could not assist the case of the defendant but by showing him in what respects the plaintiffs' case might be weak (i). And where in an action

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Form for obtaining order for inspection.
Cost of inspection.

Time for application.

Power enlarged at Common Law by 14 & 15 Vict. c. 99, s. 6, and made analogous to power in equity.

(a) *Steadman v. Arden*, 15 M. & W. 587; *Ley v. Barlow*, 1 Ex. 800.

(b) *Reid v. Coleman*, 2 C. & M. 456; *King v. King*, 4 Taunt. 666; *Blakey v. Porter*, 1 Taunt. 386.

(c) *Ex parte Partridge*, 1 Har. & Wol. 350.

(d) *Charnock v. Lumley*, 5 Scott, 438.

(e) Including mandamus to enforce a civil right, *Reg. v. Ambergate, &c., Railway Co.*, 17 Q. B. 957.

(f) *Hunt v. Hewitt*, 7 Ex. 236.

(g) *Gomm v. Parrott*, 3 C. B. N. S. 47.

(h) *Bolton v. Corporation of Liverpool*, 1 M. & K. 88; see also *Burrell v. Nicholson*, 1 M. & K. 680; *Att.-Gen. v. Lambe*, 3 Y. & C. 162; *Combe v. Corporation of London*, 1 Y. & C. C. C. 631; 6 Jur. 571; 15 L. J. Ch. 80.

(i) *The Chartered Bank of India, &c., v. Rich*, 4 B. & S. 73; 32 L. J. Q. B. 300. But see *Bustros v. White*, 1 Q. B. D. 423; 45 L. J. (App.) Q. B. D. 642; 34 L. T. N. S. 835; 24 W. R. 721.

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If documents relevant to case of party seeking discovery, inspection allowed, though merely negative case of opponent if no denial that documents support applicant's negative case.

Rule applied whatever the nature of dispute.

Disapproved in one case.

on a fire policy, the defendants set up that the account delivered by the plaintiff was fraudulent, the Court allowing inspection of communication between the Company and their agent at the time of effecting the policy, and between the Company and others who shared the risk as to the value of the property, refused to allow inspection of the reports of the Company's officers as to the result of their examination of the ruins and salvage (a).

But if the documents be relevant to the case of the party applying, inspection will be allowed, although that case be merely a negative of the case of the opponent, and the documents form the title or disclose the case of the latter, if the allegation of the documents supporting the applicant's negative case be not denied by the possessor of the documents. So where an action was brought for customary tolls and other payments upon coal exports by defendant, and he denied that any such customary tolls were payable, and alleged specific variations in the amount of toll paid from time to time, it was held in the Court of Chancery that he was entitled to inspection of documents in the plaintiff's possession admitted to contain entries relating to the payment of the alleged tolls, and the terms of it, and showing variations in the amount of the toll paid (b). In accordance with this case, on a feigned issue under 8 & 9 Vict. c. 118, s. 56, to try whether the plaintiffs had such an interest in a manor as entitled them to object to the inclosure of certain lands within it, the case of the defendants being that, in the year 1800, one L., through whom the plaintiffs claimed, had agreed in writing to an allotment of 151 acres in lieu of his interest in the waste, it was held that the defendants were entitled to inspection of the conveyance of the manor to L. before 1800, and of the subsequent conveyances through which the plaintiff took, of the agreement and of leases made after 1800, of the alleged allotment, on the ground that the conveyances would show that L. was in 1800 lord of the manor, and they might show what were the parcels before and since, and that the leases would show acts of ownership over the 151 acres (c).

The principle here set forth applied whatever might be the nature of the dispute. So, in an action for libel, in charging the plaintiff with dishonesty in omitting to pay to the defendants money received by the plaintiff on their account while in their service, the defendants having pleaded a justification, the plaintiff was allowed an inspection of accounts furnished by him to the defendants, of moneys received by him, of entries of such moneys in their books, and of letters written by him to the defendants while in their service, so far as such matters related to the acts of dishonesty charged (d). But in another case of libel for charging a company with insolvency, the defendant had pleaded a justification, and had obtained from a Judge in Chambers an order allowing him to inspect the plaintiffs' books, the order was disapproved of by the Court, including the Judge who had granted it (e), on the ground that one publishing a libel should be prepared to prove it without being allowed to ransack the books of the person libelled to try and find a justification. Yet it seems that a Court of Equity would, in such a case, grant discovery (f), and, if so, under the section before cited, the Court of Law was bound to do so since the passing of the 14 & 15 Vict. c. 99. Where a

(a) *Wooley v. Pole*, 14 C. B. N. S. 538; 32 L. J. C. P. 263.

(b) *Smith v. Duke of Beaufort*, 1 Ha. 507; 1 Ph. 269; see also *Combe v. Corporation of London*, 1 Y. & C. C. C. 631; 6 Jur. 571; 15 L. J. Ch. 80.

(c) *Riccard v. Inclosure Commissioners*, 4 E. & B. 329.

(d) *Collins v. Yates*, 27 L. J. Ex. 150.

(e) *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 146.

(f) See Hare on "Discovery," 116, cited by Willes, J., in *Bartlett v. Lewis*, 12 C. B. N. S. 263-4; *Macaulay v. Shakell*, 1 Bli. N. S. 96; *Wilmot v. Macabe*, 4 Sim. 263.

defendant was sued for work and labour done, and denied that any work was done, and alleged that if any work had been done, the charge was excessive, and that it was not done on his credit but that of another, he was allowed to inspect the books of the plaintiff containing entries as to the work (a).

A fortiori, where the applicant had to make out an affirmative case, was he entitled to inspection of all documents relevant to it. Thus in an action for the price of goods sold and delivered, the plaintiff was entitled to inspect any entries in the defendant's books relating to the receipt, or the weighing, or measuring of the goods (b), and where the plaintiff brought an action against a company for wrongful dismissal, he was allowed inspection of the resolution, and of all entries and minutes relating to his engagement (c). So in *The London Gaslight Company v. Chelsea* (d), in an action brought for gas supplied under an agreement, the defendants denied that the quality and quantity of the gas were according to contract, the plaintiffs were held entitled to inspection of documents showing the result of experiments made by the engineer of the defendants on the quality and quantity of the gas supplied. And in *Daniel v. Bond* (e), an action, by consignee of goods, against shipowners for unseaworthiness of the vessel, the plaintiff was held entitled to inspection of surveys of the ship, a general average statement, the shipwright's bill for repairs, the captain's protest, and the log-book; although it seems formerly inspection of such documents was confined to actions against underwriters. Before the decision of the case last cited, it had been held that a party could not, under s. 50 of the Common Law Procedure Act, 1854, hereafter mentioned, be compelled to answer what documents he has in his possession relating to the matters in dispute, unless it were shown that such documents would be evidence for the applicant (f); but the case of *Daniel v. Bond* has clearly enlarged that rule, for many of the documents, of which production in that case was ordered, could not be evidence in the cause, and this was pressed on the Judges in argument, who held that the documents, though not evidence, were proximately connected with the issue to be tried, and that as such they ought to be produced (g). To an action for not accepting goods, the defendant pleaded fraud, a Judge at Chambers ordered inspection of correspondence between the plaintiffs and their consignor, and between them and their broker after the contract and the breach, which the defendants alleged would show that at the time the alleged misrepresentations were made the plaintiffs knew them to be untrue, the Court refused to set aside the order (h). In Chancery, on a bill filed by the heir and general devisee of a client to set aside the sale of an estate to a solicitor on the ground of inadequacy of value, the devisees and executors of the solicitor were compelled to give inspection of the conveyance to him, and of copies of subsequent conveyances of parts of the

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Where applicant had to make affirmative case *à fortiori* entitled.

Former rule enlarged by
Daniel v. Bond.

(a) *Hunt v. Hewitt*, 7 Ex. 236; see also *Rayner v. Allhusen*, 2 L. M. & P. 605; 21 L. J. Q. B. 68; *Galsworthy v. Norman*, 21 L. J. Q. B. 70; *Scott v. Walker*, 2 E. & B. 555.

(b) See per Willes, J., 6 C. B. N. S. 424.

(c) *Hill v. Great W. Railway Co.*, 10 C. B. N. S. 148; *Houghton v. London and County Assurance Co.*, 17 C. B. N. S. 80.

(d) 6 C. B. N. S. 411.

(e) 9 C. B. N. S. 716; see also *Baker v. London and S. W. Railway Co.*, L. R. 3 Q. B. 91.

(f) *Thompson v. Robson*, 2 H. & N. 412.

(g) See also *Combe v. Corporation of London*, 1 Y. & C. C. C. 631; *Riccard v. Enclosure Commissioners*, 4 E. & B. 329; *Chartered Bank of India, &c.*, v. *Rich*, per Blackburn, J., 4 B. & S. 73; 32 L. J. Q. B. 300; see also *Fortescue v. Fortescue*, 34 L. T. N. S. 847; 24 W. R. 945; but see *Bustros v. White*, 1 Q. B. D. 423; 45 L. J. (App.) Q. B. D. 642; 34 L. T. N. S. 835; 24 W. R. 721.

(h) *Coleman v. Trueman*, 3 H. & N. 871.

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Remarks.

Though title of party seeking inspection denied, yet he is entitled to inspection of documents proximately relating to it.

Documents alleged by party called on to produce them to be irrelevant to case of party calling for them not produced.

Difference between Equity and Law in these matters.

Bull v. Clarke.

estate by him, and a valuation of the estate, as all these were or might turn out to be relevant to the question of value (a).

In an action against the keeper of a lunatic asylum for improper treatment, inspection was ordered of such parts of the books directed by the statute to be kept as related to the plaintiff's case, and also of the licence of the defendant, and of the medical certificate under which the plaintiff was confined, and all letters relating to the plaintiff written by the defendant to the commissioners of lunacy (b).

Though the title of the party seeking inspection be denied, he will nevertheless be entitled to inspection of such documents as proximately relate to that title. So in a suit by assignees, where the defendants denied that the plaintiffs were assignees, but the bill stated facts from which the plaintiffs alleged they showed title, and the defendants admitted possession of documents relating to the matters in the bill, it was held that these documents must be produced (c); but it is submitted that only the documents relating to the case, actually set up, will be ordered to be produced, and not those merely relating to the relief consequent on that case being established. Thus in *Adams v. Fisher* (d), where the plaintiff charged that the defendant had acted as his solicitor in getting in a testator's estate, and prayed for an account of moneys received by him, and the defendant, by his answer, alleged that he had acted solely as the solicitor of P. to whom the plaintiff had given a power of attorney, and had never been employed by the plaintiff, it was held that the plaintiff was not entitled to inspection of documents belonging to the testator's estate admitted to be in the hands of the defendant. Documents which, if the allegation of the party called on to produce them be true, have nothing to do with proving the case of the party calling for them are not to be produced for his inspection (e). So where a plaintiff claimed a sixth of the defendant's profits, and the defendant, denying his right to a sixth, admitted an agreement to pay him a sum equal to a twelfth by way of addition to his salary, but alleged that it was also agreed that he was to take the defendant's word for the amount, and was not to be allowed to examine the accounts, it was held that the plaintiff was not entitled to an inspection before the hearing (f). In Chancery, had the plaintiff, the party claiming the production, proved his right at the hearing, he would then have been entitled to the inspection asked for: at law, the application was, and is, in the nature of things, final; but the same principle is followed, the Judge determining the right on the affidavits, and deciding accordingly. Thus in *Temperly v. Willett* (g), the Court, having come to the conclusion from the affidavits that the plaintiff had no cause of action, and that the action was not *bonâ fide*, but in order to obtain inspection of a document for the purpose of another action, refused inspection. In *Bull v. Clarke* (h), however, the defendant claimed to set off a commission upon sales to persons introduced by him, the plaintiffs pledged their oaths, denying any contract for commission, the defendant was nevertheless allowed to inspect the plaintiffs' books, the plaintiffs being allowed to seal up those parts of the books with which they swore he had no concern: but this case, though at first sight it seems opposed to the principle, was properly decided, as it was the belief of the Court that the entries would probably afford material evidence on the very matter of conflict, viz., whether a contract for commission had or had not existed.

(a) *Gresley v. Mousley*, 2 K. & J. 288.

(b) *Hill v. Philp*, 7 Ex. 232.

(c) *Goodall v. Little*, 1 Sim. N. S. 163.

(d) 3 M. & C. 526.

(e) See also *De la Rue v. Dickenson*, 3 K. & J. 388; *Smith v. Fox*, 6 Ha. 386.

(f) *Turner v. Bailey*, 33 L. J. Ch. 499.

(g) 6 E. & B. 380.

(h) 15 C. B. N. S. 851.

It has already been shown that an attorney or solicitor was protected from answering questions put to him as to matters, the subject of professional confidence, between him and his clients, except in rare exceptional cases (a), and it extended to documents in his hands as well as matters to be orally disclosed; but, as in the case of oral disclosures, the limit of privilege as regards the client does not seem clearly fixed with regard to documents; in the earlier cases the privilege seems to have extended in the case of the client only to documents in his hands with reference to some dispute actually pending, and any communications made *ante litem motam*, even with reference to title, were unprotected. The tendency of the later cases has been, however, to extend the privilege (b). Thus in *Walsingham v. Goodricke* (c), a suit for specific performance of a contract for sale of land, it appeared that, pending negotiations, and before any contract had been signed between the parties, the defendant had communicated with his attorney on the matter of the contract, and had received several letters from him: on a motion for the production of these letters, the Vice-Chancellor observed that if the matter were *res integra* he should scarcely hesitate to decide in favour of the privilege; but, on review of the authorities, he concluded that it had not been carried to the extent claimed, but held that it did apply to any part of the letters containing legal advice or opinions. But where the communications relate to rights of property or title, it would seem now to be determined that they are protected, though made before any dispute has arisen, and without reference to any particular dispute contemplated. In *Pearse v. Pearse* (d), Knight Bruce, V.-C., referring to *Richards v. Jackson* (e) and *Radcliffe v. Fursman* (f), observed that neither of them decided that if a man, with relation to his own private interests merely, upon a point on which he does not owe any fiduciary duty to another, lays a statement before counsel for his advice professionally, he may be compelled afterwards to disclose it if there was at the time neither suit nor dispute existing; that, if they did, he must endeavour to think them not opposed to any principle of English law or general jurisprudence, though there would be some difficulty in the task; and that he was at a loss to perceive any substantial difference between the liability of the client, and that of his counsel or solicitor, to disclose the client's communications made in confidence professionally to either. The remarks of the Vice-Chancellor in this case have met with the strongest approval of Lord Selborne in the case of *Minet v. Morgan* (g). In *Manser v. Dix* (h) the bill was to set aside a purchase on the ground of notice to the purchaser of facts giving the vendor an equity. A motion having been made for the production of the purchaser's instructions to counsel for the preparation of the draft agreement of purchase, the draft agreement itself, and the opinion of counsel upon the draft conveyance, Wood, V.-C., refused to order the production of any of them; the two last as being opinions of counsel, and so within the rule of *Walsingham v. Goodricke* (i), and the first, because it related to title and was on that ground distinguishable from the letters in that case ordered to be pro-

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Privilege of solicitor extends to documents.

Former limit of privilege extended.

(a) See pp. 315-317.

(b) But see *Anderson v. The Bank of British Columbia*, 2 Ch. D. 644; 45 L. J. Ch. D. 449; 35 L. T. N. S. 76; 24 W. R. 624, 724.

(c) 3 Ha. 122.

(d) 1 De G. & Sm. 12.

(e) 18 Ves. 474.

(f) 2 Br. P. C. 514.

(g) L. R. 8 Ch. 361; 42 L. J. Ch. 627; 28 L. T. N. S. 573; see also *Bacon v. Bacon*, W. N. 1876, 96; 34 L. T. N. S. 349, and *Mostyn v. Mostyn Coal and Iron Co., Limited*, 34 L. T. N. S. 531.

(h) 1 K. & J. 451.

(i) 3 Ha. 122.

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Remarks.

Privilege as to
communica-
tions between
client and
adviser with
reference to
dispute actually
pending, &c.

Documents in
hand of inter-
mediaries.

When and
where applica-
tion made.

Application
should be sup-
ported by
affidavit.

duced, which related only to the question of whether there had been a contract or not, and he expressed his concurrence with the views of Knight Bruce, V.-C., above stated, which he considered at variance with the case of *Flight v. Robinson* (a), where Lord Langdale, M. R., while protecting all communications respecting an estate made after the sale, ordered production of all previously made (b).

It is, however, clear that production will not be ordered of communications between a party and his legal adviser acting as such with reference to a dispute actually pending, and which has been followed by litigation, but not in contemplation of or with reference to that litigation (c), still less where made in contemplation of (d) or in course of litigation (e); and it is immaterial that the dispute or litigation has been with other parties (f).

The rule as to privilege in regard to documents in the hands of intermediaries is precisely the same as that affecting discovery generally in similar cases, as to which see *ante* (g); and the other privileges as to discovery generally apply equally as to disclosure of documents, as to which see also *ante* (h).

The application was made either to the Court or to a Judge at Chambers, and generally ought, in the first instance, to have been made to a Judge. It might be made before issue joined (i); but in one case an application before declaration by the defendant to inspect a mortgage deed was refused, though the particulars of demand claimed for money due on a covenant in the deed (k).

The party applying should show by affidavit, first, the nature of the suit and of the question to be tried by it, and also that he has just ground to maintain or defend it; secondly, the affidavit ought to state distinctly the reason of the application and the nature of the documents, in order to show that the documents are material to the case of the applicant, and that the application is not a fishing one for defects in the case of the opposite party, and also that the opponent may admit or deny the possession of them (l). Thus an affidavit that deponent was advised that it might be necessary that certain minutes should be produced at the trial, and that without inspection he could not safely proceed to trial, was held insufficient (m); as was also an affidavit that it was material and necessary, in order to enable the defendant to defend the action and to arrive at a proper conclusion as to the state of accounts between him and the plaintiff, that he should have inspection of certain bonds, books, &c., in the plaintiff's possession (n). And where the defence was that the work claimed for was done on the credit of another, it was held that to support an application for inspection of entries in the plaintiff's books for the purpose of ascertaining whether credit was not therein given to

(a) 8 Beav. 22; see also *Hawkins v. Gathercole*, 1 Sim. N. S. 150.

(b) See also *Ford v. De Pontès*, 29 L. J. Ch. 883; *Warde v. Warde*, 1 Sim. N. S. 18, overruled on other grounds, 3 Mac. & G. 365.

(c) *Vent v. Pacey*, 4 Russ. 193; *Walsingham v. Goodricke*, 3 Ha. 122.

(d) *Bolton v. Corporation of Liverpool*, 1 M. & K. 88; *Clayett v. Phillips*, 2 Y. & C. C. C. 82.

(e) *Hughes v. Biddulph*, 4 Russ. 190.

(f) *Combe v. Corporation of London*, 1 Y. & C. C. C. 631; *Holmes v. Baddeley*, 1 Ph. 476.

(g) Pp. 315-318.

(h) Pp. 306-319.

(i) *Rogers v. Turner*, 21 L. J. Ex. 8.

(k) *Jones v. Hargreaves*, 29 L. J. Ex. 368.

(l) *Hunt v. Hewitt*, 7 Ex. 244.

(m) *Pepper v. Chambers*, 7 Ex. 226.

(n) *Sneider v. Mangino*, 7 Ex. 229.

another, the affidavit should have further denied that the defendant had authorised that other to pledge his credit (*a*). But in an action by a servant of a company for a wrongful dismissal, the contract being denied, an affidavit by the plaintiff that he verily believed that certain agenda, minute, and letter books contained entries relating to his appointment and employment, that they related to the matters in question, and that it was necessary he should be prepared to prove the entries as part of his case, was, under the circumstances, held sufficient, there being no affidavit in denial (*b*).

To this affidavit the opponent may answer by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is, for any sufficient reason, privileged from producing them; or he may submit to show parts covering the remainder on affidavit that the part concealed does not in any way relate to the plaintiff's case (*c*).

The affidavit must distinctly deny that the documents are relevant to the case of the applicant (*d*). It will not suffice to deny that it will tend to prove it (*e*), nor will the Court be bound by an affidavit of want of relevancy; but if it see, from the materials before it, that the documents are relevant, it will order an inspection (*f*). But, except in such a case, the denial on oath of the possession of the documents or of their relevancy is conclusive (*g*).

The order should specify time and place for inspection, it is in general at the office of the attorney of the party producing (*h*); but books in daily use have been allowed to be inspected at the place of business (*i*). If it be desired that inspection should be had by some person specially called in for the purpose, the order should specially provide for this: the word "agent" in the common order in equity does not include such a person (*k*).

The costs of inspection are generally paid by the party seeking it (*l*), but the costs of the summons or rule are sometimes costs in the cause (*m*); there is, however, no general rule to this effect (*n*).

So far as we have already remarked, however, at Common Law, there was no machinery by which a party could discover what documentary evidence of his case was in the possession of his opponent—a matter often most essentially necessary to his case; but by the Common Law Procedure Act, 1854, s. 50, it was provided that: "Upon the application of either party to any cause or other civil proceeding in any of the Superior Courts" (it was held, however, that this section did not apply in the case of a petition of right, and an application in such a case for dis-

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Remarks.

Answering
affidavit.

Order to give
time and place
for inspection.
When it should
be special.

Costs.

Discovery what
documents in
the antagonist's
hands were
evidence for
applicant, 17
& 18 Vict.
c. 125, s. 50.

(*a*) *Hunt v. Hewitt*, 7 Ex. 236; see also *Wright v. Morrey*, 11 Ex. 209.

(*b*) *Houghton v. The London and County Assurance Co.*, 17 C. B. N. S. 80.

(*c*) *Hunt v. Hewitt*, 7 Ex. 244.

(*d*) *Edwards v. Jones*, 1 Ph. 501.

(*e*) *Smith v. Duke of Beaufort*, 1 Ph. 219; *Bute v. Glamorganshire Canal Co.*, 1 Ph. 681; *Mansell v. Feeney*, 2 J. & H. 320.

(*f*) *Att.-Gen. v. Lambe*, 17 L. J. Ch. 154; *Chartered Bank of India, &c., v. Rich*, 4 B. & S. 73; 32 L. J. Q. B. 300; but see *Bustros v. White*, 1 Q. B. D. 423; 45 L. J. (App.) Q. B. D. 642; 34 L. T. N. S. 835; 24 W. R. 721.

(*g*) *Reynell v. Sprye*, 1 De G. M. & G. 660; *Adams v. Lloyd*, 3 H. & N. 351.

(*h*) *Rogers v. Turner*, 21 L. J. Ex. 8; see *infra* as to Chancery.

(*i*) *Mertens v. Haigh*, 1 Johns. 735.

(*k*) See *Bartley v. Bartley*, 1 Drew, 233; *Summerfield v. Prichard*, 17 Beav. 9; *Draper v. Manchester, Sheffield, &c., Railway Co.*, 30 L. J. Ch. 236; *Bonnardet v. Taylor*, 1 J. & H. 383.

(*l*) *Hill v. Philp*, 7 Ex. 232.

(*m*) *Stilwell v. Ruck*, 4 H. & N. 468.

(*n*) *Hunt v. Hewitt*, 7 Ex. 236; *Rayner v. Allhusen*, 2 L. M. & P. 605; *Galsworthy v. Norman*, 21 L. J. Q. B. 70.

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Where and
when applica-
tion made :
how supported.

Affidavit to
show specific
document in
possession of
opponent.

Privilege no
defence to this
application.

Semble, Court
not bound by
rules of Court
of Equity.

covery was refused (a). "Upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or Judge to order that the party against whom such application is made, or if such party is a body corporate that some officer, to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made, the Court or Judge may make such further order therein as shall be just."

This application, which should in general be before a Judge in Chambers, might be made by a defendant before plea (b). Except in the case of corporations it must have been supported by the affidavit of the applicant, and the Court had no power to dispense with such affidavit (c); but, in the case of a corporation's application, the affidavit of the solicitor was sufficient (d). Upon the necessity for this affidavit to obtain discovery of documents, the practice grew up formerly of interrogating as to documents for the purpose of obtaining material for the affidavits; since the new practice, however, where no such affidavit is now necessary (see r. 12), such an interrogatory will be struck out, unless an order be first obtained under that rule (e). The affidavit must have stated, or shown reasonable grounds for the belief that some specific document, which the applicant had a right to inspect, was in the possession or power of the opposing party (f), though if it were defective in this respect, the defect might probably be supplied by an affidavit of his attorney (g). It was no answer to the application, that the party answering was privileged from producing the documents—that ground should be insisted on in the affidavit made in obedience of the Rule or Order (h)—nor was it absolutely necessary to the applicant's case that he was entitled to the production for the purpose of discovery, if he had any other title to the production (i).

Upon the affidavit being made, the Court or Judge was authorised to make such further order therein as should be just: these words were, it seems, held to exempt the Court from the established rules binding Courts of Equity in similar circumstances. This at least seems to have been the judgment of Erle, C. J., in the case of *Daniel v. Bond* (k), in which he held that matters not strictly evidence must be produced as tending to lead to evidence in the cause.

Apparently on these grounds, it was formerly an ordinary practice in

(a) *Thomas v. The Queen*, L. R. 10 Q. B. 44.

(b) *Forshaw v. Lewis*, 10 Ex. 712.

(c) *Herschfeld v. Clarke*, 11 Ex. 712; *Christopherson v. Lotinga*, 15 C. B. N. S. 809.

(d) *Kingsford v. Gt. W. Railway Co.*, 16 C. B. N. S. 761.

(e) *Pitten v. Chatterburg*, W. N. 1875, 248; 20 S. J. 139; *Bannicot and Frith v. Harris*, W. N. 1876, 9; 20 S. J. 217.

(f) *Hewett v. Webb*, 2 Jur. N. S. 1189; *Thompson v. Robson*, 2 H. & N. 412; *Wooley v. Pole*, 14 C. B. N. S. 538; see also *Bray v. Finch*, 1 H. & N. 468.

(g) *Hewett v. Webb*, 2 Jur. N. S. 1189.

(h) *Forshaw v. Lewis*, 10 Ex. 712.

(i) See per Parke, B., *Osborn v. London Dock Co.*, 10 Ex. 702.

(k) 9 C. B. N. S. 723, and cited ante, p. 325; see also *Hill v. Campbell*, per Coleridge, C. J., and Grove and Brett, J.J., L. R. 10 C. P. 223; and *Bartlett v. Lewis*, 12 C. B. N. S. 261-262.

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Judges' Chambers at Common Law, for the Judge to look at a disputed document before making order either way for its production or not. But it has now been held by the Court of Appeal, that any objection of privilege must be determined independently of the document itself, that if privileged, production should not be made of the document, even to the Judge, and that if the Court looks at the document by consent of the parties, both parties thereby lose the right of appeal against its order on the matter (a).

In Chancery, the right of a plaintiff to the production of documents material or relevant to his case in the possession of the defendant existed from time immemorial. The old way in which this right was exercised was by the plaintiff framing his bill so as to call on the defendant, to set forth the short contents of the documents in question, or to produce them; and if on the answer the defendant admitted possession of them, and described them in such a way as to identify them, if they were not sufficiently disclosed, the Court would have given an order for their production (b). This course being somewhat expensive, the custom arose of charging generally that the defendant had in his possession documents relating to the case; thereupon interrogatories were framed of a more or less searching nature, according to the case, so as to obtain from the defendant an admission as to the documents in his possession; on his answer, and on such admission, an order was obtained for their production (c).

Right in Chancery immemorial.

Old practice in that Court.

By the 15 & 16 Vict. c. 86, s. 18, it shall be lawful for the Court upon the application of the plaintiff in any suit in the said Court, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant upon oath of such of the documents in his possession or power relating to matters in question in the suit as the Court shall think right (d), and the Court may deal with such documents, when produced, in such manner as shall appear just (e).

15 & 16 Vict. c. 86, s. 18.

It is, therefore, not now necessary that the defendant should admit in answer the possession of documents before production can be obtained, and if he express his willingness to make an affidavit, as to documents as required by the present practice, he might decline to answer the interrogatory as to documents (f); but if he profess to answer it, he must answer fully (g), and where interrogated as to any particular document, he is bound to answer as to it (h). Where defendant in his answer stated certain instruments, under which he claimed adversely to

Not now needful that defendant should admit in answer possession of documents.

(a) *Bustros v. White*, 1 Q. B. D. 423; 45 L. J. Q. B. D. 642; 34 L. T. N. S. 835; 24 W. R. 721.

(b) *Atkyns v. Wright*, 14 Ves. 211-213; *Princess of Wales v. Earl of Liverpool*, 1 Sw. 123; see also *Somerville v. Mackay*, 16 Ves. 382-387; *Unsworth v. Woodcock*, 3 Mad. 432.

(c) *Bettison v. Farrington*, 3 P. Wms. 363; *Tyler v. Drayton*, 2 S. & S. 309; *Evans v. Richard*, 1 Sw. 7.

(d) *Ante*, p. 320.

(e) *Bustros v. White*, 1 Q. B. D. 423; 45 L. J. (App.) Q. B. D. 642; 34 L. T. N. S. 835; 24 W. R. 721.

(f) *Perry v. Turpin*, Kay, App. xlix.; *Barnard v. Hunter*, 4 W. R. 34; *Piffard v. Beeby*, L. R. 1 Eq. 623; see *Rochdale Canal Co. v. King*, 15 Beav. 11; 9 Ha. App. 49, n.; *Law v. London Indisputable Co.*, 10 Ha. App. 20; *Kidger v. Worswick*, 5 Jur. N. S. 37; but see *Hudson v. Grenfell*, 3 Gif. 388.

(g) *Piffard v. Beeby*, L. R. 1 Eq. 623.

(h) *Catt v. Tourle*, 18 W. R. 966.

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Course formerly where plaintiff required inspection of documents.

Where application made.

When.

Persons not parties, but bound by decree, entitled to apply.
Suit needful to give right.

Where production sought from company or corporation.

an heir-at-law, he was compelled to answer an interrogatory as to whether such instruments had been revoked or cancelled or not (*a*).

Where a defendant formerly required from the plaintiff inspection of documents, as where he required oral discovery, he was forced to file a cross bill to obtain it (*b*); but if it was necessary to him, in order to enable him to put in a sufficient answer, the time for answering would on his application be extended until a limited time after the plaintiff had produced them in the other suit (*c*), and, if the plaintiff neglect to make the production, his bill might be dismissed (*d*). But by 15 & 16 Vict. c. 86, s. 20, it shall be lawful for the Court, upon the application of any defendant, in any suit, whether commenced by bill or by claim—but, as to suits commenced by bill where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill unless the Court shall make any order to the contrary—to make an order for the production, by the plaintiff in such suit on oath, of such of the documents in his possession or power relating to the matters in question in the suit as the Court shall think right, and the Court may deal with such documents when produced, in such manner as shall appear just.

The application under both these sections was by summons in Chambers (*e*).

The plaintiff might apply at any period of the suit, and need make no affidavit in support of his application (*f*).

Persons not originally parties to the suit, but who will be bound by the decree, were held entitled to apply under these sections (*g*); and, after a decree for administration, any creditor might apply for production of documents relating to his claim (*h*); and the rule applies conversely to make persons in the like condition liable to produce documents (*i*). But the right is only given by the institution of a suit: an arbitration, made a rule of Court, will not give the parties to it a right to production of documents (*k*), see *post*, p. 333, and (*l*).

Where production of documents in a suit in Equity was sought from a company or corporation, the secretary or officer of the company should have been made a party for that purpose (*m*). Where a foreign govern-

(*a*) *Fortescue v. Fortescue*, 34 L. T. N. S. 847; 24 W. R. 945; see also *Magdalen Hospital v. Knotts*, 21 S. J. 610.

(*b*) See *Potter v. Potter*, 3 Atk. 719; *Pickering v. Rigby*, 18 Ves. 484; *Princess of Wales v. Earl of Liverpool*, 1 Sw. 114, 123, 580; *City of London v. Thompson*, 3 Sw. 265 n. (*b*); *Micklethwaite v. Moore*, 3 Mer. 292-296; *Shepherd v. Morris*, 1 Beav. 175; *Taylor v. Heming*, 4 Beav. 235; *Bate v. Bate*, 7 Beav. 528-537; and see, as to time for answer in cross suit, *Holmes v. Baddeley*, 7 Beav. 69; Daniell, C. P. 1403.

(*c*) *Princess of Wales v. Lord Liverpool*, 1 Sw. 114, 120, 580; *Jones v. Lewis*, 2 S. & S. 242; *Shepherd v. Morris*, 1 Beav. 175; *Taylor v. Heming*, 4 Beav. 235; and see *Pickering v. Rigby*, 18 Ves. 484-5.

(*d*) *Princess of Wales v. Lord Liverpool*, 3 Sw. 567; Daniell, Ch. P. 697, 698, 1700.

(*e*) Notice 10th Nov., 1852.

(*f*) *Rochdale Co. v. King*, 15 Beav. 11; see *Parkinson v. Chambers*, 1 K. & J. 72.

(*g*) *Dent v. Dent*, L. R. 1 Eq. 186.

(*h*) *Re McVeagh*, 1 De G. J. & S. 399; and see *Forbes v. Tanner*, 11 W. R. 414; *Macrae v. Smith*, 2 K. & J. 411.

(*i*) Daniell, Ch. P. 1665.

(*k*) *Re Anglo-Australian Bank*, 10 L. T. N. S. 369.

(*l*) *Re Barned's Banking Co.*, L. R. 2 Ch. 350.

(*m*) *Ranger v. Great W. Railway Co.*, 4 De G. & J. 74; see *Law v. London Indisputable Policy Co.*, 10 Ha. App. xx.; *Att.-Gen. v. East Dereham Corn Exchange Co.*, 5 W. R. 486; comp. *Imperial Mercantile Credit Association v.*

ment brings a suit in this country, and discovery is required from them, proceedings will be stayed, on application by defendants, until the plaintiffs shall have supplied the names of proper persons to be made co-defendants to a cross suit by the defendants, against the foreign government, for the purpose of making upon oath the discovery needed (*a*). Where the clerk of a company stated in his affidavit that all the documents were in the possession of the warden, and that he could not inspect them without the permission of the warden, this affidavit was held insufficient (*b*). A secretary, made party for the purpose of discovery, could not evade it by resigning his office on the filing of the bill (*c*). Under a proceeding for winding up a company in a contest between the company and an alleged contributory, the official liquidator is in the same position as if, on a bill filed against the company, he had been made defendant for purposes of discovery (*d*).

Documents are to be produced ordinarily in Chancery at the Record and Writ Clerks' Office (*e*); but the Court will allow production at the defendants' place of business, if he states that the documents are in constant and necessary use in his business (*f*); but it is not sufficient to show that they are in constant use, without further stating that they cannot be removed without inconvenience (*g*). Production is often ordered at the office of the solicitor of the party ordered to produce (*h*); in which case he is not allowed to charge the party inspecting for attendances (*i*), nor for copies, except at stationers' charges (*k*). If defendant is required to produce or obtain information as to documents not in his possession, he is entitled to have the costs of so doing first tendered to him (*l*).

Plaintiff, having obtained the common order for production, may inspect documents which are usually produced only on payment of customary fees, *e.g.* Court rolls, without payment of any fee (*m*).

The common undertaking, to produce "to the plaintiff," means "to the plaintiff, his solicitors, and agents," unless this be guarded against by the terms of the undertaking (*n*); but it does not authorise inspection by a person in a non-professional relation to the plaintiff, though alleged to be the only person acquainted with the accounts to be inspected (*o*). The plaintiff's agent for the purpose of inspection should, it seems, be a legal agent, or at least a general agent, not one appointed for the special purpose (*p*).

But, on a special case made, a special order may be obtained for an inspection by an accountant (*q*), but not one who has a personal interest in

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Remarks.

Winding up
analogous to
suit between
company and
alleged con-
tributories.

Where inspec-
tion made.

By whom.

Special order
made where
duly applied
for.

Whitham, L. R. 3 Eq. 89; *Chaffers v. Woolmer*, 30 L. T. 126; see also *The Republic of Siberia v. The Imperial Bank*, L. R. 16 Eq. 179.

(*a*) *United States of America v. Wagner*, L. R. 2 Ch. 582; *Republic of Peru v. Weguelin*, L. R. 20 Eq. 140.

(*b*) *Att.-Gen. v. Mercers' Co.*, 9 W. R. 83, compare *infra*.

(*c*) *Acomb v. Landed Estates Co.*, 14 W. R. 86; and see *Carew v. Davis*, 21 Beav. 213.

(*d*) *Re Barned's Banking Co.*, L. R. 2 Ch. 350.

(*e*) O. XLII., r. 3, Consolidated Orders.

(*f*) *Grane v. Cooper*, 4 M. & C. 263; see *Mertens v. Haigh*, Johns. 735.

(*g*) *Hooper v. Gumm*, 2 J. & H. 602.

(*h*) See *Groves v. Groves*, 2 W. R. 86; *Daniell*, Ch. P. 1677.

(*i*) *Flockton v. Peake*, 12 W. R. 1023.

(*k*) *Kennedy v. George*, 6 W. R. 218.

(*l*) *Bethell v. Casson*, 12 W. R. 200.

(*m*) *Hoare v. Wilson*, L. R. 4 Eq. 1.

(*n*) *Williams v. Prince of Wales Assurance Co.*, 23 Beav. 338.

(*o*) *Summerfield v. Pritchard*, 17 Beav. 9.

(*p*) *Draper v. Manchester, &c., Railway Co.*, 3 De G. F. & J. 23.

(*q*) *Bonnardet v. Taylor*, 1 J. & H. 383.

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Remarks.

Affidavit of
party, against
whom order
made, neces-
sary, even
though privi-
leged from
production.

Form of
affidavit.

No cross-exa-
mination or
counter-affida-
vit allowed.

Practice where
affidavit insuf-
ficient.

the case (a). Thus, in *Re Joint Stock Discount Company* (b), an accountant was allowed to inspect the books of a company in course of being wound-up on behalf of the shareholders, on certain conditions; and, where the issue in a cause depended in a great measure on the state of the originals of certain engineering plans and documents, and the defendant deposed that he was not possessed of any engineering knowledge, and that the inspection of the documents would be useless to him without the aid and assistance of an engineer, the order for production and inspection was directed to extend to the defendant's surveyor (c).

On a decree in an administration suit, a creditor supported his claim in Chambers by the production of certain documents. The plaintiff believing them to be forged, applied to have them deposited with the chief clerk, and for liberty to have them produced to be examined by scientific persons to test their genuineness, and the application was granted, the creditor's solicitor being allowed to be present at such examination (d).

The common order for production did not authorise inspection by a co-defendant (e); but it is immaterial that the party inspecting is a joint witness in the cause, if the question be merely as to the contents of the documents (f): it is, of course, otherwise if the question be as to the authenticity of the documents themselves (g).

The defendant against whom an order was obtained was compelled to make the affidavit, though he might have a good objection to production: the question of liability to produce was one thing, and the sufficiency of the affidavit claiming protection, another (h).

The order was in the form that plaintiff, his solicitor, or agent, might be at liberty to inspect and peruse such documents admitted by defendant as he may not by his affidavit object to produce, and to take copies thereof and extracts therefrom, as he shall be advised, at his own expense (i). When copies were furnished by the other side, the costs were arranged, among other costs, by O. XXXVII. of Consolidated Orders in Chancery, r. 3, *et seq.*

The form of the affidavit was settled by Sched. 3 to the Regulations of August 8th, 1857, and was not allowed to be varied except to meet the special circumstances of the case (k).

No cross-examination was allowed on the affidavit as to documents (l), nor could any counter-affidavit be filed (m), except as to irrelevant matter introduced into the affidavit (n).

If the affidavit were insufficient, as not giving a full and distinct description of the documents admitted, the course was to take out a summons to consider its sufficiency (o); but the order which provides that,

(a) *Draper v. Manchester, &c., Railway Co.*, 3 De G. F. & J. 23.

(b) 15 W. R. 99.

(c) *Swansea Vale Railway Co. v. Budd*, L. R. 2 Eq. 274.

(d) *Groves v. Groves*, Kay, App. xix., marginal note.

(e) *Bartley v. Bartley*, 1 Drew, 233.

(f) *Swansea Vale Railway Co. v. Budd*, L. R. 2 Eq. 274.

(g) *Groves v. Groves*, Kay, App. xix.

(h) *Rumbold v. Forteath*, 3 K. & J. 44; *Lazarus v. Mozley*, 5 Jur. N. S. 1119; *Nicholl v. Jones*, 13 W. R. 451; *Manby v. Bewick*, 27 L. T. 55; *Quin v. Ratcliffe*, 9 W. R. 65; *Hanslip v. Kitton*, 1 De G. J. & S. 440.

(i) *Seton*, 1040; *Mertens v. Haigh*, Johns. 735.

(k) *Woodhatch v. Freeland*, 11 W. R. 398; *Newall v. Telegraph Co.*, L. R. 2 Eq. 756.

(l) *Manby v. Bewick*, 8 De G. M. & G. 470; *Newall v. Telegraph Co.*, L. R. 2 Eq. 756.

(m) *Westminster, &c., Co. v. Clayton*, 12 W. R. 123.

(n) *Underwood v. Secretary for India*, 14 W. R. 551; see *Lamb v. Orton*, 1 Drew, 414; *Wing v. Harvey*, 1 Sm. & G. App. x.

(o) *Lazarus v. Mozley*, 5 Jur. N. S. 1119.

after a third insufficient answer, the defendant shall stand committed, O. XVI., r. 9, Consolidated Orders, did not apply to a third insufficient affidavit of documents (*a*).

If the affidavit were inconsistent with the answer, or a suspicion arises that documents relating to the matters in the suit are omitted, or that the defendant is claiming to protect documents which he ought to produce, the remedy was to take out a further summons requiring the defendant to state whether he had a particular document or class of documents in his possession (*b*), or, as the case may be, requiring him to produce the documents which he improperly claims to protect (*c*).

If the affidavit were technically sufficient but the inquiry founded on the bill were not sufficiently pointed to enable the plaintiff to obtain discovery as to specific matters, his course was to amend his bill, and file his interrogatories as to the specific matters on which he sought discovery, and he was then entitled to a further affidavit as to documents: so a defendant, in like manner, was entitled to file a concise statement and interrogatories for the like purpose (*d*).

A party could not refuse to produce documents in the possession of his solicitor, merely on the statement of his solicitor that they were irrelevant, he must himself have inspected them and be able to swear they were irrelevant (*e*); nor could the solicitor refuse to produce them because he claimed a lien on them (*f*), but if they be the agent's private property he need not produce them (*g*).

Where documents ordered for production are in a foreign country, the party required to produce them must show not only that it would be difficult to produce them, but that he has tried and failed (*h*).

Documents in the possession of a stranger to the suit, previously to its institution, cannot be ordered to be produced in his absence (*i*); and if such person has covenanted to produce the documents for the maintenance and justification of the title of a party to the suit, he cannot be ordered to produce them in a suit hostile to such party (*k*); but full information must be given as to the nature of such documents (*l*).

So where a person, not a party to the suit, has a joint interest in the documents, they will probably be protected, but full information must be given in the affidavit (*m*). Thus directors of a company could not be

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Practice where affidavit technically sufficient but inquiry not sufficiently pointed.

Affidavit of irrelevancy.

Solicitor's lien.

As to documents abroad.

Documents in possession of stranger.

Where stranger has joint interest in documents.

(a) *Harford v. Lloyd*, 2 W. R. 537.

(b) *Westminster & Brymbo, &c., Co. v. Clayton*, 12 W. R. 123; *Noel v. Noel*, 1 De G. J. & S. 468; *Caton v. Lewis*, 22 L. J. Ch. 946; *Bowes v. Fernie*, 3 M. & C. 632.

(c) *Nicholl v. Jones*, 13 W. R. 451; *Lafone v. Falkland Islands Co.*, 27 L. J. Ch. 25; *Greenwood v. Greenwood*, 6 W. R. 119.

(d) *Newall v. Telegraph Co.*, L. R. 2 Eq. 756; *Warden v. Peddington*, 32 Beav. 639.

(e) *M'Intosh v. Great Western Railway Co.*, 4 De G. & Sm. 544; *Manby v. Bewick* (3), 8 De G. M. & G. 476.

(f) *Lockett v. Cary*, 10 Jur. N. S. 144; *Hope v. Liddell*, 7 De G. M. & G. 331; *Re Cameron's Coalbrook Railway Co.*, 25 Beav. 1; but see *Re Gregson*, 26 Beav. 87; *North v. Huber*, 29 Beav. 437, and Cases *infra* on Documents in Pawn.

(g) *Colyer v. Colyer*, 9 W. R. 452; but see *Bishop of Winchester v. Bowker*, *ib.* 404.

(h) *Mertens v. Haigh*, 11 W. R. 792; see also, on this matter, *Freeman v. Fairlie*, 3 Mer. 44.

(i) See *Burbridge v. Robinson*, 2 Mac. & Gord. 244; *Fraser v. Burrows*, W. N. 1877, 76; 46 L. J. Q. B. D. 501.

(k) *Bethell v. Casson*, 1 H. & M. 806.

(l) See *Gresley v. Mousley*, 2 K. & J. 288; *Taylor v. Rundell*, Cr. & Ph. 104; *Bovill v. Cowan*, 15 W. R. 608; *Clinch v. Financial Corporation*, L. R. 2 Eq. 271.

(m) *Edmunds v. Foley*, 30 Beav. 282; *Bailey v. Cass*, 10 W. R. 370; *Ford v. Dolphin*, 1 Drew, 222; *Lord Eglinton v. Lamb*, 14 W. R. 170.

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Remarks.

Letters written
to a party.

Implied under-
taking on which
order for pro-
duction ob-
tained.

Co-defendant
interested in
documents
scheduled
should be
served with
summons to
produce.

New rules do
not enlarge
former powers.

ordered to produce documents in which other directors had a joint interest (a). So also, where documents had been pawned before the institution of the suit, and the defendant was unable to redeem them (b), production was not ordered.

But where a defendant had in his possession letters written to him by one not a party to the suit, which were admitted to be material, he was compelled to produce them, though marked private and confidential, and though the sender objected to the production (c). In this case Lord Cairns is reported to have said, "The writer" (of a letter) "is supposed to intend that the receiver may use it for every lawful purpose, and it has been held that publication is not such a lawful purpose; but, if there is a lawful purpose for which a letter can be used, it is the production of it in a court of justice for the furtherance of the ends of justice" (d). In the case of *Lee v. Hammerton* (d), the report of a medical officer of an insurance company, being material, was ordered to be produced, though confidential. But, on an order in such a case, an undertaking not to use the letters for any collateral purpose was ordered to be given (e); and generally, indeed, when the plaintiff obtains an order for production and inspection of documents, he does so on an implied undertaking not to make public any information so obtained, or to communicate such information to persons not parties to the suit (f); and it seems the Court would grant an injunction to restrain him from so doing (g).

When a co-defendant has an interest in the documents scheduled, he should be served with the summons to produce (h); even if the Court should hold that there are grounds for not ordering production of the documents on account of a third person's interest therein, still the party must give all the information in his power as to the documents of which he has partial possession, and disclose their contents as far as they are material (i).

The rules privileging documents from production are the same as those affecting the privilege as to oral discovery (k), and are identical or nearly so at law and in equity (l).

It will thus be seen that the new rules do not enlarge the powers the Courts already had in matters of discovery, and in some respects the old powers were larger than any provided by the new rules. Thus the power given by the Common Law Procedure Act, 1854, s. 50, was in some respects a larger power than any specifically given by these rules, which provide no machinery for compelling a party to disclose what documents he is possessed of, as a preliminary to requiring production of them when discovered. It is, however, submitted that this power, which thus exists at common law, together with the similar one in Chancery existing in the

(a) *Penney v. Goode*, 1 Drew, 474; *Reid v. Langlois*, 1 Mac. & Gord. 627; *Lazarus v. Mozley*, 5 Jur. N. S. 1119.

(b) *Liddell v. Norton*, Kay, App. xi.; see *Re Williams*, 7 Jur. N. S. 323; *North v. Huber*, 29 Beav. 437; but as to *Solicitor's lien*, see *ante*, p. 335.

(c) *Hopkinson v. Lord Burleigh*, L. R. 2 Ch. 447.

(d) See *Penkethman v. White*, 2 W. R. 380; *Lee v. Hammerton*, 12 W. R. 975.

(e) *Hopkinson v. Lord Burleigh*, L. R. 2 Ch. 447; *Richardson v. Hastings*, 7 Beav. 354.

(f) *Williams v. Prince of Wales Assurance Co.*, 23 Beav. 338.

(g) *Ibid.*, see also *Reynolds v. Godlee*, 4 K. & J. 88; *Enthoven v. Cobb*, 5 De G. & Sm. 595; on appeal, 2 De G. M. & G. 632; *Bowen v. Pearson*, 11 W. R. 819.

(h) *Gresley v. Mousley*, 2 K. & J. 288.

(i) *Taylor v. Rundell*, Cr. & Ph. 104; *Bovill v. Cowan*, 15 W. R. 608; *Clinch v. Financial Corporation*, L. R. 2 Eq. 271.

(k) *Clegg v. Edmondson*, 22 Beav. 125-127; *Rajah of Coorg v. East India Co.*, 2 Jur. N. S. 407.

(l) *Hill v. Campbell*, L. R. 10 C. P. 222.

interrogatory as to documents and under ss. 18 & 20 of the Act 15 & 16 Vict. c. 86, may probably be retained under the provision contained in the 73rd section of this Act, for they are not inconsistent with the provisions of the Act in this respect.

The rules by which discovery and inspection are in fact to be sought, obtained, and resisted, are contained in the whole of O. 31.

1. The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the Court or a Judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose.

[RULE I.]

When plaintiff and defendant may, without order, and also by leave, deliver interrogatories.

The principles on which the rules in this order are founded will be found in the foregoing summary on Discovery and Inspection, and in the notes on rr. 4 and 11. These rules contain the order of the machinery by which discovery and inspection shall be sought, obtained, and resisted; but some of the other rules of this Order may require a little more particular notice.

Interrogatories may be served in a proper case before defence is delivered; but where delivered without proper ground, an application to strike them out will be retained until after statement of defence delivered, and if then unnecessary they will be struck out with costs (a). In an action on a bill of exchange, the defendant had obtained leave to appear; his defence was that he was suing as nominee for the drawer, and that there had been a total failure of consideration; under these circumstances defendant was allowed to serve interrogatories before delivery and statement of defence (b). In *Disney v. Longbourne* (c) the Master of the Rolls explained *Mercier v. Cotton* (a); but refused, in the case before him, leave to serve interrogatories till after statement of defence delivered. The circumstances of the case were as follows. The action was against executors of a deceased trustee seeking to

(a) *Anon.*, W. N. 1876, 11; 20 S. J. 81, 219; *Strong v. Tappin*, W. N. 1876, 22; 20 S. J. 240; *Fenwick v. Johnston*, W. N. 1876, 54; 20 S. J. 280; *Drake v. Whiteley*, W. N. 1876, 55; 20 S. J. 281; *Cotching v. Hancock*, W. N. 1876, 55; 20 S. J. 281; *Mercier v. Cotton*, W. N. 1876, 136. The Court being divided on this point discharged the rule to rescind the order, in order to allow the plaintiff to appeal. On appeal, 1 Q. B. D. 442; 46 L. J. (App.) Q. B. D. 184; 35 L. T. N. S. 79; 24 W. R. 566, Court affirmed former rule, holding that under r. 5 interrogatories put before defence delivered were in ordinary cases not to be considered put *bonâ fide* unless reason were shown for then putting them.

(b) *Hawley v. Reade*, W. N. 1876, 64; 20 S. J. 298.

(c) 2 Ch. D. 704; 45 L. J. Ch. D. 532; 35 L. T. N. S. 301; 24 W. R. 663.

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[RULE I.]

make his estate liable for alleged breaches of trust. Executors had filed an affidavit to the effect that they knew nothing as to the facts of the case, but that if they were allowed to interrogate the plaintiff before putting in statement of defence, they believed that they would be able to show that the plaintiff had no case. The Master of the Rolls held that the proper course was to put in a statement of defence stating that the defendants were entirely ignorant of the circumstances alleged, and did not admit such allegations, but claimed the benefit of every defence which might be open to them. Along with such a statement they might, without leave of the Court, deliver interrogatories, and if the plaintiff's answer disclosed any defence, the defendants might then apply to amend their statement of defence. The application, however, was dismissed with costs. In another case interrogatories were objected to as implicating others than the defendants. Held, that the defendants, having denied the charge made by the plaintiffs, the latter were entitled to interrogate as to matters relating to it (a).

It seems that where discovery is sought after pleadings are closed the practice is the same now as formerly (b). In *Swire v. Redman*, discovery was sought after the close of pleadings; the plaintiffs' claim was based on an agreement that they should accept bills for the accommodation of defendants (partners) on commission. Bills were to be drawn against goods shipped abroad by the defendants, and plaintiffs were to be reimbursed out of the proceeds of sale of goods. Defendants were not to draw for more than the manufacturing prices of goods. The claim was for excess of acceptances over the amount realised by sale, and for damages for fraud of the defendants in drawing for more than the manufacturing prices. Holt, one of the defendants, did not defend; Redman, the other, denied the agreement for the limit of drafts to manufacturing prices, and further alleged that he had retired from the partnership, and that plaintiffs had released him by taking renewed bills from Holt accepted by Holt alone. Plaintiffs had already interrogated to ascertain the manufacturing prices; Redman had answered he could give no information, as the goods were not sufficiently identified. The plaintiffs having obtained production of the defendants' books, wished now to repeat the interrogatories with better description of the parcels of goods. Amphlett, B., refused to allow interrogatories, and his decision was affirmed by the Divisional Court on the ground that the allegation of fraud was immaterial, as damages would be identical whether fraud was shown or not. The Court of Appeal held fraud material, because though the novation alleged would have released Redman from the mere money demand, it would not release him from the claim founded on fraud, but the interrogatories being unnecessarily complex, the application was dismissed with costs without prejudice to a fresh application for leave to deliver interrogatories in proper form (c).

In *Ellis v. Ambler* it was held that interrogatories will not be allowed after the close of pleadings, unless the party seeking to administer them satisfactorily explains the delay (d); but in *The London and Provincial Marine Insurance Co. v. Davies* (e) the reply had been delivered on the 22nd December, 1876. The action had been set down for hearing before Vice-Chancellor Malins on February 1st, and was in May transferred to Fry, J. Defendant, on May 19th, gave notice of motion for leave to file interrogatories, which was given; interrogatories to be filed within two days, and hearing not to be delayed on account of their not being

(a) *McCorquodale v. Bell*, W. N. 1876, 39; 20 S. J. 260.

(b) *Anon.*, 20 S. J. 32.

(c) *Swire v. Redman*, 20 S. J. 584.

(d) 36 L. T. N. S. 410; 25 W. R. 557.

(e) 5 Ch. D. 775; 37 L. T. N. S. 67; 25 W. R. 876.

answered. It is presumed that in this case good cause was shown, but the report is very meagre.

If under the new practice it be necessary to obtain leave to administer interrogatories, the nature of the interrogatories may be gone into in the first instance on the application for the order, and no application will then be needed under r. 5 (a). Having reference to r. 11, no interrogatory should be administered as to the contents of a document until after an order has been obtained for inspection of the document, or it is liable to be expunged (b). See further notes to r. 5, and to Order generally.

2. The Court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the Court or Judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

3. Interrogatories may be in the Form No. 7 in Appendix (B.) hereto, with such variations as circumstances may require.

4. If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

Upon this rule see the *Republic of Costa Rica v. Erlanger* (c); and *Hall v. London & North-Western Railway Co.* (d); see also the *Republic of Peru v. Weguelin*, under the old practice (e).

5. Any party called upon to answer interrogatories, whether by himself or by any member or officer, may, within four days after service of the interrogatories, apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant, or is not put *bonâ fide* for the purposes of the action, or that the matter inquired after is not sufficiently material at that stage of the action, or on any other

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[RULE I.]

[RULE II.]

Court may inquire as to propriety of exhibiting such interrogatories, and may visit with costs persons improperly exhibiting them.

[RULE III.]

Form of interrogatories.

[RULE IV.]

If party be corporation or joint stock company, &c., other party may apply for leave to serve any member or officer with interrogatories.

[RULE V.]

Party interrogated may apply to strike out any interrogatory as scandalous or irrelevant, or not *bonâ fide*.

(a) *Hewetson v. Whittington Life Insurance Society*, W. N. 1875, 219; 20 S. J. 179.

(b) *Pitten v. Chatterburg*, ante, p. 330; W. N. 1875, 248; 20 S. J. 139.

(c) 1 Ch. D. 171; 45 L. J. Ch. D. 145; 24 W. R. 151.

(d) 35 L. T. N. S. 848.

(e) L. R. 20 Eq. 140.

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[RULE V.]

Cases on interrogatories decided since the acts and rules came into force.

ground. And the Judge, if satisfied that any interrogatory is objectionable, may order it to be struck out.

The following cases may probably prove some guide as to the grounds on which the judges will, or refuse to, allow interrogatories to be struck out, put, or amended. In an action by an auctioneer to recover money which had been paid to him as a deposit by an intending purchaser, and handed over by him to the defendant, for whom he was selling, an application was made to strike out the following interrogatory delivered by the defendant to the plaintiff, What were the monthly receipts of the business which formed the subject of the alleged agreement? the interrogatory was allowed (*a*). In this case there was a counter claim, for the plaintiff had not required a sufficient sum as deposit, and to this the interrogatory was no doubt material.

In an action for refusal to accept goods sold, the goods being patent button fastening machines, seven interrogatories as to French law were struck out, Archibald, J., remarking that the plaintiffs could not be considered as experts in French law; two others were struck out which were directed to show that the plaintiffs had bought the goods delivered at a cheap price (*b*). Interrogatories were struck out as irrelevant without prejudice to any fresh interrogatories that the defendant might be advised to deliver (*c*).

In an action for breach of promise interrogatories to prove mere expectation of means by the defendant, as to the means of his relations, and as to settlement made by them on his present wife, were struck out (*d*). But in another action of the same kind an interrogatory as to settlement by the defendant on his wife was not allowed to be struck out (*e*). In *Wilton v. Brignell*, the following interrogatories were delivered: Was not passage set out in paragraph 3 of statement of claim intended by the defendant to apply to the plaintiff? if not, say to whom? Last question struck out. Were not the words set out in paragraph 5, &c.? Struck out as repetition. Were you yourself the writer of any of the passages mentioned in the statement of claim? If not, who was? Also struck out (*f*).

In an action against an auctioneer for the price of a horse sold by him for the plaintiff, the following interrogatories were struck out. Was the horse, &c., the property of the plaintiff at the time of the sale? If it was yours, how did it become so? (*g*)

In an action for libel in stating that the plaintiff had written anonymous criticisms disparaging the works of other writers of reputation, and praising his own writing, the defence was not guilty, and justification as fair literary criticism. The plaintiff sought to expunge interrogatories administered by the defendant. Archibald, J., in giving judgment, made the following remarks: "Defendant first says the plaintiff published certain articles, and then seeks to interrogate him as to what articles he has written. He must know that the plaintiff has written the articles upon which he seeks to justify, and not have to interrogate him to discover it—that is fishing for a defence. The defendant might ask, Did you not in certain papers write such and such articles? But not, What articles did you write? Nor can the defendant ask under what circum-

(*a*) *Anon.*, W. N. 1876, 56; 20 S. J. 283.

(*b*) *Phillips v. Barron*, W. N. 1876, 54; 20 S. J. 280.

(*c*) *Anon.*, W. N. 1876, 39; 20 S. J. 261; see also *Mansfield v. Childerhouse*, ante, p. 308, 4 Ch. D. 82; 46 L. J. Ch. D. 30; 35 L. T. N. S. 590; 25 W. R. 68.

(*d*) *Anon.*, W. N. 1876, 22; 20 S. J. 242.

(*e*) *Anon.*, 20 S. J. 122.

(*f*) *Wilton v. Brignell*, W. N. 1875, 239; 20 S. J. 121.

(*g*) *Sivier v. Harris*, W. N. 1876, 22; 20 S. J. 240.

stances 'The Fleshly School of Poetry' was published under the signature of Thomas Maitland, and as to what was the nature of the misadventure mentioned in the plaintiff's letter by which the signature of Thomas Maitland came to be affixed to it. He is only entitled to put particular circumstances to the plaintiff, and ask him whether it was under those circumstances" (a).

In an action on a policy of assurance. Defence—general traverse and allegation of unseaworthiness. The defendant was an underwriter, who had accepted an assignment of the policy. Application was made to strike out interrogatories delivered by the plaintiff to the defendant on the ground that the interrogatories were simply the whole statement of claim in interrogative form. The defendant was only assignee of a policy, and knew nothing of the matters interrogated on, and had traversed the allegations in the statement of claim with the object of requiring strict proof of them. Denman, J.: "If the defendant denies the facts which the plaintiff alleges, the plaintiff has a right to interrogate him on them. If the defendant be able to swear truly that he knows nothing of them, that would clearly be a sufficient answer" (b). A plaintiff in a cause of damage delivered to the defendants, before the conclusion of the pleadings, interrogatories relating to the circumstances of the collision, seeking information similar to that which would be supplied by the defendants' preliminary act. The Court ordered the interrogatories to be struck out (c).

An action was brought by an executor to set aside a sale of pictures to the testator by the defendant, a picture-dealer, on the ground of fraud. Plaintiff delivered interrogatories requiring a list of the pictures purchased by the testator, stating their names, the prices paid for them by the testator, the names of the persons of whom the defendant bought them, the prices paid by him, the description under which he bought them, the names of the artists by whom they were represented to have been painted, and that the defendant should set forth to the best of his belief where the persons from whom he bought the pictures purchased them, and the prices paid by them. Objections were taken to these interrogatories with reference to this Rule (and to r. 8, *post*, which see), and objection was also made to the form of the application (under rr. 9 and 10, *post*, which see). The V.-C. held that there was no reason for refusing to answer the interrogatories; that this Rule had no application whatever, every question being material and *bonâ fide*. As to the procedure it might be by summons or motion, and if by summons would in this case have had to be adjourned into Court (d).

For questions struck out in another case, too long to be here set out, see case below (e). An interrogatory as to documents was struck out by Lindley, J., for the simple purpose of making the practice uniform (f). Interrogatories will be allowed which go to prove the case, but not merely for the purpose of shaking the character of the party interrogated (g). Interrogations put in a form which made it almost impossible to answer them, were ordered to be amended (h). Interrogatories should only be struck out when objectionable or oppressive, and not for mere error of form (i). It has been held that an application under this rule is the proper mode of objecting to an interrogatory bad in substance. **R. 8** is to

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[RULE V.]

Cases on inter-
rogatories.

(a) *Buchanan v. Taylor*, W. N. 1876, 73; 20 S. J. 298.

(b) *Anon.*, W. N. 1876, 106; 20 S. J. 341.

(c) *The Biola*, 34 L. T. N. S. 185; 24 W. R. 524.

(d) *Leigh v. Brooks*, W. N. 1877, 24; 21 S. J. 238.

(e) *Carter v. Leeds Daily News Co.*, W. N. 1876, 11; 20 S. J. 218.

(f) *Bannicot v. Harris*, W. N. 1876, 9; 20 S. J. 217.

(g) *Baker v. Newton*, W. N. 1876, 8; 20 S. J. 177.

(h) *Armitage v. Fitz William*, W. N. 1876, 56; 20 S. J. 281.

(i) *Winters v. Dabbs*, W. N. 1876, 21; 20 S. J. 240.

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be resorted to where there are special reasons for objecting to answer what would in ordinary cases be a good interrogatory (*a*). Upon this rule see also *Hewetson v. Whittington Life Insurance Society* before noted (*b*). In general, interrogatories should not be delivered until statement of defence is delivered; in case of such premature delivery of interrogatories the order to be prayed for is, that the interrogatories be struck out without prejudice to fresh interrogatories which the plaintiff may desire to deliver with or after statement of defence (*c*). Where interrogatories are administered, which manifestly ought not to be put, the party interrogated may leave them unanswered without alleging any reason for so doing, and is not obliged to apply to have them disallowed (*d*). See further notes to r. 1.

[RULE VI.]

Answer by
affidavit filed
within ten
days.

6. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Judge may allow.

Answers to interrogatories made abroad, but not under oath, were by consent allowed to be filed (*e*).

[RULE VII.]

Answer to be
printed if more
than *ten* folios.

7. An affidavit in answer to interrogatories shall, unless otherwise ordered by a Judge, if exceeding three folios, be printed, and may be in the Form No. 8 in Appendix (B.) hereto, with such variations as circumstances may require.

This Rule is amended as follows by the Rules of the Supreme Court, June, 1876:—

[RULE VIIA.]

7A. In Order XXXI., Rule 7, of "The Rules of the Supreme Court" the word "ten" is hereby substituted for the word "three" before the word "folios."

In a case where there was an affidavit of twenty-five folios made in answer, with a schedule of two hundred folios, the V.-C. ordered both to be filed in writing on the ground of costs (*f*).

[RULE VIII.]

Objection to
answering.

8. Any objection to answering any interrogatory may be taken, and the ground thereof stated in the affidavit.

With reference to this Rule see *Voysey v. Cox* (*a*), *supra*. Quain, J., expressed his opinion that this rule only applies to objections on the ground that answering might criminate the answerer (*g*). In any case mere sub-

(*a*) *Voysey v. Cox*, W. N. 1876, 12; 20 S. J. 219.

(*b*) W. N. 1875, 219; 20 S. J. 179; *ante*, p. 338.

(*c*) *Strong v. Tappin*, W. N. 1876, 22; 20 S. J. 240; *Fenwick v. Johnston*, W. N. 1876, 54; 20 S. J. 280; *Drake v. Whiteley*, W. N. 1876, 55; 20 S. J. 281; *Cotching v. Hancock*, *ibid*; *ante*, p. 337; *Mercier v. Cotton*, 1 Q. B. D. 442; 46 L. J. (App.) Q. B. D. 184; 35 L. T. N. S. 79; 24 W. R. 566.

(*d*) *Smith v. Berg*, 36 L. T. N. S. 471; 25 W. R. 606; *Church v. Perry*, 36 L. T. N. S. 513.

(*e*) *Bacon v. Turner*, W. N. 1876, 292.

(*f*) *Webb v. Bomford*, 46 L. J. Ch. D. 288; W. N. 1877, 5; 25 W. R. 251.

(*g*) *Anon.*, 20 S. J. 100.

mission by the party interrogated that he was not bound to answer was insufficient, and he must answer (a); on this rule, see *Leigh v. Brooks* (b), ante, p. 341; also *Smith v. Berg*, supra (c).

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9. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a Judge on motion or summons.

[RULE IX.]

No exceptions allowed, but sufficiency to be determined by Court or Judge on motion or summons.

Discovery was ordered to be made, where the answer was insufficient, by further answers within four days. Application to be by summons in Chambers, and to specify particular answers objected to (d). On this Rule also see *Leigh v. Brooks* (b) ante, p. 341.

10. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further either by affidavit or by vivâ voce examination, as the Judge may direct.

[RULE X.]

Party omitting to answer sufficiently may be ordered to answer or to be interrogated vivâ voce.

Under this rule see the cases cited under r. 9. An attempt to compel a party answering to omit a qualification to his answer, which, in fact, set up his defence, was unsuccessful, as the qualification was substantially part of the answer (e), see r. 23.

11. It shall be lawful for the Court or a Judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

[RULE XI.]

Production of documents may be ordered at any time during action or proceeding.

Even before appearance inspection has been ordered, as before stated (f). But in general the plaintiff will not be allowed to claim it until he has delivered his statement of claim, and it seems not even then if it be demurrable (g). This rule is really founded on ss. 18, 20, of 15 & 16 Vict. c. 86, and the practice of the old Court of Chancery is to be followed on questions under it (h). Under these sections the judge had no discretion, and only privileged

(a) See also W. N. 1875, 229.

(b) W. N. 1877, 24; 21 S. J. 238; ante, p. 341.

(c) 36 L. T. N. S. 471; 25 W. R. 606; *Church v. Perry*, 36 L. T. N. S. 513.

(d) *Chesterfield and Boythorpe Colliery Co. v. Black*, W. N. 1876, 204; 24 W. R. 783; 20 S. J. 642.

(e) *Anon.*, W. N. 1876, 39; 20 S. J. 261.

(f) *Anon.*, 20 S. J. 81.

(g) *Cashin v. Craddock*, 2 Ch. D. 140; 34 L. T. N. S. 52; see also W. N. 1876, 29.

(h) *Anderson v. The Bank of British Columbia*, 2 Ch. D. 644; 35 L. T.

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documents could be excluded from inspection (a). The name of a shareholder being struck off the list of contributories under a winding up, the company appealed and applied to the Vice-Chancellor to order the respondent to make an affidavit of documents. The Vice-Chancellor held that there was no action before him under this Rule. Application was thereupon made to the Court of Appeal, where it was held, that the Court had jurisdiction to make the order (b). In *Hutchinson v. Glover*, the plaintiffs were the owners of goods shipped on board the defendant's vessel, the B., and claimed that the goods had been lost through a collision between the B. and the H., owing to the defendant's negligence. The suit and cross suit had been previously commenced in the Court of Admiralty between the owners of the two vessels, which were compromised by a private agreement in writing. Held that the plaintiffs were entitled to inspection of this agreement, with an average statement attached to it: for that, without deciding that such an objection would be material, it did not appear that the owners of the H. objected to the inspection; and the document clearly related to the matter in question, as it might contain an admission of liability on the part of the defendants (c). Documents will not be ordered to be produced on the application of one defendant, which may be material as between plaintiff and another defendant, but in which the applicant has no interest (d). An affidavit of documents was ordered, on the application of the plaintiff, to be taken off the file, the plaintiff not requiring any further affidavit to be filed, and the defendant undertaking to produce any of the documents in his possession which might be required (e). In actions referred under s. 57 of the Act of 1873, orders for production of documents should be made by the Judge who has directed the reference, and an application in the nature of an appeal will lie to him from orders made by the referee. Query whether such an order as to documents be within the jurisdiction of referee (f). In *Rowcliffe v. Leigh* (g), a claim was carried in by a horse dealer engaged in the sale and purchase of horses for the testator, who claimed a balance due to him. The executrix required discovery from the claimant that he should disclose the prices which he had obtained for the horses which he had sold for the testator, and the names of the persons to whom he had sold them. He objected, alleging that the custom of the business was that the customer named the price he was willing to take for the horse he desired to sell, and that whatever the dealer obtained beyond the price named he was entitled to retain for himself. Evidence was adduced in support of the custom. Hall, V.-C., declined to admit it, and held the discovery must be made. The Court of Appeal held, however, that r. 19 applied, and that the executrix was not entitled to the discovery until the determination of the former question whether the alleged custom existed, and if it did there would be no right to the discovery. See also on this rule *Magdalen Hospital v. Knotts* (h).

N. S. 76; 24 W. R. 624, 724; *Bustros v. White*, 1 Q. B. D. 423; 45 L. J. (App.) Q. B. D. 642; 34 L. T. N. S. 835; 24 W. R. 721.

(a) *Bustros v. White*, *supra*; see *Friend v. London, Chatham, and Dover Railway Co.*, 2 Ex. D. 437; 36 L. T. N. S. 729; 25 W. R. 735; *Martin v. Butchard*, 36 L. T. N. S. 732.

(b) *Re National Funds Assurance Co.*, W. N. 1876, 192; 24 W. R. 774; 20 S. J. 561, 584.

(c) *Hutchinson v. Glover*, 1 Q. B. D. 138; 45 L. J. Q. B. D. 120; 33 L. T. N. S. 834; 24 W. R. 185.

(d) *Bagnell v. Carlton*, W. N. 1876, 215.

(e) *Taylor v. Keily*, W. N. 1876, 139.

(f) *Re Leigh*; *Rowcliffe v. Leigh*, 4 Ch. D. 661; 46 L. J. Ch. D. 60; 25 W. R. 56.

(g) 25 W. R. 783; 21 S. J. 630.

(h) 21 S. J. 610; *ante*, p. 263; see also *Fortescue v. Fortescue*, 24 W. R. 945; 34 L. T. N. S. 847; *ante*, p. 332.

12. Any party may, without filing an affidavit, apply to a Judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action.

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[RULE XII.]

Application for
order for dis-
covery of
documents.

Objection being taken to an application under this order, that the applicant named no document in the possession of the opposite parties was disallowed under this rule (*a*). And it was held that a party resisting discovery on the ground of privilege, might in his affidavit protect himself as to any document on which he claimed privilege. In an action for damages for breach of duty in and about carrying goods by sea, discovery under this order was sought before statement of claim was delivered; the order was made for the usual affidavit of documents relating to the cause of action mentioned in an affidavit named in the order (*b*). But in an action for wrongfully building on land adjoining the plaintiff's, no statement of claim having been delivered, application was made by the plaintiff for discovery. The Judge held that statement of claim must first be delivered (*c*). So also, an application for discovery by a defendant who had not delivered his statement of defence, and showed no special ground for application at that stage, was postponed till after the statement of defence delivered (*d*). It was urged as an objection to an application under this rule, that the action was by landlord against the tenant on lease, and the plaintiff, therefore, could not require discovery. Quain, J., held that the order is now a matter of course (*e*). In *Mostyn v. Western Coal and Iron Co.*, where it was contended that under this rule no cause need be shown for an order, Huddleston, J., held that there must be some slight grounds shown; it does not, however, appear on what authority this opinion was pronounced, and in fact in the case in question the order was made (*f*). When it is said that the order is now given as a matter of course, it is not meant that it is given without summons, which must be taken out for it (*g*). The old practice was retained as to causes commenced before the 1st Nov., 1875, and in such case, therefore, an affidavit was required for order to inspect (*h*). And in such an action, interrogatories being delivered without order since the date of the passing of the acts were struck out (*i*). But an affidavit of documents filed after the 1st Nov., 1875, upon an order made 12th June, 1875, in the old form, was held insufficient, and ordered to be amended according to form in Appendix B (*k*). The order under this rule includes documents that have been, even if they be no longer, in the power of the opposite party; under the old rule the order related only to documents then in his possession or power, and interrogatories were necessary with

(*a*) *Anon.*, W. N. 1876, 22, 54; 20 S. J. 242, 243.

(*b*) *Ley v. Marshall*, W. N. 1876, 23; 20 S. J. 241.

(*c*) *Anon.*, W. N. 1876, 55; 20 S. J. 282; see also *ib.* case following the last almost to the same effect; see also *Anon.*, W. N. 1876, 53; 20 S. J. 282.

(*d*) W. N. 1876, 53, 55; 20 S. J. 282; *Mercantile Mutual Insurance Co. v. Shoemith*, W. N. 1876, 64; 20 S. J. 298; *Plum v. Normanton Iron and Steam Co.*, W. N. 1876, 73; 20 S. J. 298.

(*e*) *Anon.*, W. N. 1875, 231, 249; 20 S. J. 101, 141.

(*f*) W. N. 1875, 260; 20 S. J. 161.

(*g*) *Anon.*, 20 S. J. 32.

(*h*) *Anon.*, 20 S. J. 81.

(*i*) *Anon.*, 20 S. J. 81.

(*k*) *Anon.*, W. N. 1875, 240; 20 S. J. 122.

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regard to any which had ceased to be so (a). Where party from whom discovery was sought under this rule considered he had a case for resisting it, Lush, J., adjourned the summons to enable him to file affidavit in defence (b). An objection to discovery under this rule, that the application was too late after issue joined, was overruled (c). The Judge refused an application under this section, merely for purpose of delay by the defendant, the plaintiff residing in Sweden (d). On an application for further discovery of documents, the defendant's affidavit stated that he had no documents in his power, possession, or control. It appeared that he was a bankrupt, and that all his books and papers had been handed to his trustee. Lindley, J., "The defendant must state what documents passed from him to his trustee, and the fact of their so passing (e). See with reference to this rule, *Hutchinson v. Glover* (f), before cited. An objection that an affidavit of documents was insufficient, as it made no mention of books, and had not followed the statutory form, was allowed. The statutory form is the right one, and is intended to be the common form. An affidavit of documents is intended now to be exhaustive, and the form given in the Act is so (g). In an action for negligence against a railway company, cross summonses had been taken out for discovery. The defendant's summons asked for discovery of the plaintiff's business accounts for the last five years, and this was allowed. The plaintiff's summons was for discovery of reports of other accidents at the same station, of documents showing the number of tickets issued at the station, and of documents relating to the lighting of the station; the last only was allowed, insufficient lighting being alleged as one of the causes of the accident (h). See with reference to this rule, the case before cited, of *Re The National Funds Assurance Co.* (i), and *Cashin v. Craddock* (k). The Admiralty Division will grant an order for discovery of documents on the owner of a foreign ship, who has appeared to defend an action *in rem*, but will allow reasonable time according to the circumstances of each case, for affidavits in answer to be prepared (l). In the case of *Johnson v. Smith*, for seduction, before the Exchequer Division, the plaintiff applied without any affidavit for an order for discovery against the defendant. The Judge required an affidavit to be made by the plaintiff, and on this not being complied with, dismissed the summons. The Court held that a party is not entitled to an order for discovery as of right, and that if there be nothing to suggest that the documents required are in the possession or power of the opposite party, the Judge may require an affidavit to be made by the party applying for the order (m). See also on this rule, *Magdalen Hospital v. Knotts* (n), *Rowcliffe v. Leigh* (o).

[RULE XIII.]

Form of affidavit
in answer
to such order.

13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding Rule has been

- (a) *Anon.*, 20 S. J. 56. (b) 20 S. J. 80.
 (c) W. N. 1876, 11; 20 S. J. 219.
 (d) *Anon.*, W. N. 1875, 238; 20 S. J. 102.
 (e) *Anon.*, W. N. 1876, 38; 20 S. J. 261.
 (f) 1 Q. B. D. 138; 45 L. J. Q. B. D. 120; 33 L. T. N. S. 834; 24 W. R. 185; *ante*, p. 344.
 (g) *Anon.*, W. N. 1876, 39; 20 S. J. 261.
 (h) *Anon.*, W. N. 1876, 53; 20 S. J. 282.
 (i) W. N. 1876, 192; 24 W. R. 774; *ante*, p. 344.
 (k) 2 Ch. D. 140; 34 L. T. N. S. 52; *ante*, p. 343.
 (l) *The Emma*, 34 L. T. N. S. 742; 24 W. R. 587.
 (m) *Johnson v. Smith*, 36 L. T. N. S. 741; 25 W. R. 539.
 (n) 21 S. J. 610; *ante*, p. 263; see also *Fortescue v. Fortescue*, 24 W. R. 945; *ante*, p. 332.
 (o) 25 W. R. 83; 21 S. J. 630, *ante*, p. 344.

made, shall specify which, if any, of the documents therein mentioned, he objects to produce, and it may be in the Form No. 9 in Appendix (B.) hereto, with such variations as circumstances may require.

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[RULE XIII.]

Upon this rule see the cases cited on p. 345, note (k), and *supra*.

14. Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

[RULE XIV.]

Party to any proceeding entitled to give notice to any other party to produce any document referred to; party not complying unable to use document unless he can show good cause for non-production.

This rule, or the matter of it, will be found also dealt with in the summary given at the commencement of this Order.

In an application by executors of a mortgagor in an action of ejectment by the mortgagee to inspect the mortgage deed, with a view to redeem. Lindley, J., refused to make any order for production, the plaintiff undertaking to give within a week a statement of principal, interest, and amount of costs, and of the particulars of all subsequent incumbrances, and the defendant to make all the holders of charges parties to his counterclaim to redeem (a). An action had been brought for breach of covenant in a lease. Defendant had made an assignment of one undivided moiety of the leasehold property, consisting of land, brewery, and fixtures. The plaintiff applied for order to inspect documents. Defendant objected that documents related solely to his own title. Archibald, J., said, "I should not make this order if it was a distinct property, but this is an undivided property, the interest in which can only be realized by the usufruct of the whole property. . . . I shall make the order, and leave the defendant to appeal if so advised" (b).

15. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 10 in Appendix (B.) hereto.

[RULE XV.]

Form of such notice.

16. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents

[RULE XVI.]

Party receiving

(a) *Anon.*, W. N. 1876, 23; 20 S. J. 242.

(b) *Lake v. Pooley*, W. N. 1876, 54; 20 S. J. 280.

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such notice to deliver notice stating when and where inspection may be had.

Form of such notice.

therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice may be in the Form No. 11 in Appendix (B.) hereto, with such variations as circumstances may require.

[RULE XVII.]

If party omit to give such notice, or object to give inspection, other party may apply to Judge.

17. If the party served with notice under Rule 15 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a Judge for an order for inspection.

See *Hutchinson v. Glover* (a).

[RULE XVIII.]

Applications for inspection to be to Judge; how supported.

18. Every application for an order for inspection of documents shall be to a Judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

Semble, no discovery given by the acts to which right did not exist before, though the mode of obtaining it is in some respects altered (b). On an application by a plaintiff for inspection of two documents named in the pleadings, an objection was raised by the defendant that he was the freeholder, and that the documents in question were his title deeds. The objection was allowed (c). Where defendants were a company, it was agreed that there was no power under this rule similar to that in r. 4 referring to interrogatories to order an officer of a company to give discovery. But Lush, J., said that this was supplemented by s. 50 of the Common Law Procedure Act, 1854, and ordered the officer of the company to make discovery required (d). A party is not entitled to see documents that are not relevant to his case, and inspection has been refused unless he could

(a) 1 Q. B. D. 138; 45 L. J. Q. B. D. 120; 33 L. T. N. S. 834; 24 W. R. 185; ante, p. 344.

(b) *Mattock v. Heath*, W. N. 1875, 201.

(c) *Anon.*, W. N. 1876, 40; 20 S. J. 261.

(d) *Cooke v. Ocean Steam Co.*, W. N. 1875, 220; 20 S. J. 80.

show the relevancy (a). On this rule, see the case before cited of *Hutchinson v. Glover* (b), also *Cushin v. Craddock* (c), and *Fraser v. Burrows* (d).

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[RULE XIX.]

Court or Judge may order issue or question, on which right to discovery depends, to be first determined.

19. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

This rule was made use of in the case of *Wood v. Anglo-Italian Bank*, under circumstances there arising, which see (e). Under this rule, combined with O. LVIII. r. 16 (which see) Court of Appeal made order pending appeal to stay an order giving leave to the plaintiff to inspect the defendant's process of manufacture, which the plaintiff in his action claimed to be an infringement of patent, inasmuch as the immediate enforcement of the order would render the appeal nugatory (f). With reference to this rule, also, see *Hutchinson v. Glover* (b), *Leigh v. Brooks* (g), and *Cashin v. Craddock* (c), *Rowcliffe v. Leigh* (h).

20. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly.

[RULE XX.]

Consequences of failure to answer or give inspection.

No allowance of costs for any notice or inspection under this rule is to be made, unless it be shown to the taxing officer that there were good reasons for giving such notice and making such inspection, **Order, August 12th, 1875, General Provision 15**. This rule contains a power which does not seem to have been made use of before,—that of making a default in answering or giving inspection a ground for adverse judgment in the action.

(a) *Anon.*, 20 S. J. 198.

(b) 1 Q. B. D. 138 ; 45 L. J. Q. B. D. 120 ; 33 L. T. N. S. 834 ; 24 W. R. 185 ; *ante*, p. 344.

(c) 2 Ch. D. 140 ; 33 L. T. N. S. 52 ; *ante*, p. 343.

(d) W. N. 1877, 76 ; 46 L. J. Q. B. D. 501.

(e) 34 L. T. N. S. 255 ; 20 S. J. 332.

(f) *Flower v. Lloyd*, 20 S. J. 584, 703 ; 21 S. J. 708.

(g) W. N. 1877, 24 ; 21 S. J. 238.

(h) 25 W. R. 783 ; 21 S. J. 630 ; *ante*, p. 344.

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COURT.**Ord. 31.**[RULE XX.]
—

No order of this kind is granted except in the last resort (*a*). An attempt to attach under this rule for disobedience to orders, under **O. XV.**, r. 1, and **O. XVI.**, r. 10, was refused, as this rule does not apply in either such case (*b*). An order was obtained by defendant against plaintiffs, H. and wife, for an affidavit and production of documents; wife alone made affidavit of documents, H. having absconded. Defendant moved for dismissal for want of prosecution. No order was made, except that costs be costs in the cause; it is not imperative to direct dismissal for want of prosecution in such case (*c*). In *Fisher v. Hughes* (*d*), a motion for judgment against defendant, Evan Birchley, on default of pleading, was as follows: "That he be removed from the office of trustee of the will of John Hughes, deceased, in the statement of claim named; and that all necessary and proper directions be given for that purpose, or that such other judgment may be given as upon the statement of claim the Court should consider the plaintiff entitled to." The action was commenced by one of three surviving trustees against the other two, and he claimed to have Birchley removed on the ground of misconduct and insolvency, and to have new trustees appointed in lieu of him and a deceased trustee. A vesting order was also claimed. On the 23rd of January, an order for discovery of documents was made against both defendants. Birchley delivered defence on 10th of February, but made default in filing affidavit of documents; and after several adjournments, Hall, V.-C., in Chambers, made an order under this rule, striking out his statement of defence, and placing him in the same position as if he had not pleaded. Motion was therefore now made as in default of pleading, under **O. XXIX.**, r. 10, against Birchley alone. Hall, V.-C., made an order, with costs on affidavit of service, removing Birchley from the office of trustee, and vesting his estate in the other two trustees.

[RULE XXI.]

Service of order
for discovery,
&c., on solicitor.

21. Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

[RULE XXII.]

Solicitor not
giving notice
of his service
liable to
attachment.

22. A solicitor upon whom an order against any party for discovery or inspection is served under the last rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

[RULE XXIII.]

Party may use
any one or
more answers
in evidence,
&c.

23. Any party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others: Pro-

(a) *Anon.*, 20 S. J. 57; *Twycross v. Grant*, W. N. 1875, 201, 229; 20 S. J. 97; *Anon.*, W. N. 1875, 202, 204; *Scarth v. Williams*, W. N. 1875, 218.

(b) *Pike v. Frank Keene & Byne*, W. N. 1876, 36; 35 L. T. N. S. 341; 24 W. R. 322.

(c) *Hartley v. Owen*, W. N. 1876, 193; 34 L. T. N. S. 752.

(d) 25 W. R. 528; 21 S. J. 478.

vided always, that in such case the Judge may look at the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not be used without them, he may direct them to be put in.

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[RULE XXIII.]

On this rule see case before cited (a).

ORDER XXXII.

ADMISSIONS.

Ord. 32.

1. Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party.

[RULE I.]

Any party may, on his pleadings, give notice that he admits whole or part of case set up by opponent.

This rule may no doubt serve to reduce the expense of proving a case in which there is practically no dispute or little difference about the facts of the case made. The reason it was not wanting under our present system was that in Chancery it was in fact supplied by the habit of interrogating the defendant to the bill, and in his answer he then must admit on oath the part of the plaintiff's case which he knew to be true; or, even when not interrogated, he might do so by a voluntary answer if he wished; and, at Common Law, any material part of a party's pleadings not traversed by the other party was held for the purpose of the action to be admitted. It seems from **O. XIX., r. 17**, that except in cases where infants or persons of unsound mind are concerned, this rule is maintained; but, even if it were maintained in all cases, it might still on a general traverse be desirable to admit certain parts of the case traversed, which may be done by means of the rule now under consideration.

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

[RULE II.]

Either party may call on the other to admit document. If he do not, costs of proof may be charged against him; costs of proving not allowed where no notice is given.

This rule is, almost in words, a copy of the s. 117 of the Common Law Procedure Act of 1852; and also of s. 7 of the Chancery Amendment Act, 1858, save that the section last mentioned is limited thus: In any case in which all parties to a suit are competent to make admissions,

(a) W. N. 1876, 39; 20 S. J. 261, *ante*, p. 343 (e).

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any party may call, &c.; and, of course, the new rule does not extend to cases in which a party incompetent to make admissions is called on to make them. Probably such a case would be excepted under the words at the end of the rule, as a case where the omission to give the notice would be, in the opinion of the taxing officer, a saving of expense.

[RULE III.]
Form of notice.

3. A notice to admit documents may be in the Form No. 12 in Appendix (B.) hereto.

[RULE IV.]
Evidence of
admissions.

4. An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions.

ORDER XXXIII.

INQUIRIES AND ACCOUNTS.

Ord. 33.

Court or Judge
may, at any
stage, direct
accounts and
inquiries.

The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

This Order is substantially the same as Order XX. of the Consolidated Orders in Chancery.

In the case of *Sickles v. Norris (a)*, an action by plaintiff upon an alleged agreement to pay him a marginal surplus upon a contract for the sale of 33,000 rifles, entered into between the defendants and a third party, an application was made under this Order on behalf of the plaintiff, that an account should be taken of the amount of such margin in hands of the defendants. Archibald, J., said he did not think any legal claim had been admitted by the defendants, and that before making such an order it was necessary that a *prima facie* case, legal or equitable, should be made out by the plaintiff, and referred the summons to Court. In *Irlam v. Irlam* the plaintiff had brought an action for execution of the trusts of a will, and a writ had issued in the Liverpool district, and statement of claim and defence had been delivered. The District Registrar held that he had no power to make an order for accounts and inquiries in the action, but thought he was, by **O. XXXV., r. 4**, invested with powers of Judge at Chambers, and could make decree on administration summons. Suit having been thereupon instituted by summons, and decree made and carried out, the District Registrar ordered hearing on further consideration to be taken in London. The Record and Writ Clerk refused to set it down for hearing as irregular, and the plaintiff applied to the Court for direction to set it down. The Vice-Chancellor held that the District Registrar had no power to make an administration decree, and made an order under this rule for accounts and inquiries, and ordered the

(a) W. N. 1876, 64; 20 S. J. 297.

cause to be heard in London on further consideration upon the result of the accounts and inquiries being reported (a). In *Brassington v. Cussons*, the writ issued from Manchester Registry in December, 1875, claiming an account of partnership dealings and a dissolution. On the 28th February, 1876, the District Registrar made, by consent, a decree directing accounts and inquiries, varying slightly from the usual partnership accounts and inquiries. He also, by consent, afterwards ordered a sale, and appointed a receiver of the partnership property, though doubtful of his power to do so. On the accounts being filed, he declined to go further without direction of the Judge. The plaintiff moved, before Hall, V.-C., for directions as to how the cause should proceed, and submitted that the decree and the orders and proceedings thereunder were invalid. The Vice-Chancellor held, that was so, and directed the plaintiff to give notice to all parties of his intention to move for such decree as he considered himself entitled to, beginning afresh as from before the decree. Motion was accordingly made under this order, and O. XL., r. 11, for an order directing usual partnership accounts and inquiries. Plaintiff also asked that they should be taken in the Manchester District Registry, under s. 66 of Act, 1873, and suggested that the form should be that adopted by the District Registrar, though differing somewhat from the ordinary form, and that further consideration should be adjourned in the words adopted in *Bennett v. Moore*, 1 Ch. D. 692, 24 W. R. 690. By consent of defendants, he also asked that the person whom the District Registrar had purported to appoint as receiver, should be appointed receiver, by the Court, by name. The Vice-Chancellor said the order must be in the usual form, but accounts and inquiries might be taken in the District Registry in Manchester. He adjourned further consideration in the form asked, and appointed the receiver by name (b). Upon this order, see *Rolfe v. McLaren*, before cited (c), and *The Northampton Coal and Iron Company v. The Midland Wagon Company*, 21 S. J. 789. Under this order also, or under O. XL., r. 11, a partnership account was ordered *ex parte* on admissions in an answer in *Turquand v. Wilson* (d).

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COURT.

Ord. 33.

ORDER XXXIV.

Ord. 34.

QUESTIONS OF LAW.

1. The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

[RULE I.]

Parties, after writ of summons, may concur in stating special case for Court.

Parties may in argument refer to contents of documents stated, and Court may draw inferences of fact or law.

(a) *Irlam v. Irlam*, 2 Ch. D. 608; 24 W. R. 292, 949.

(b) *Brassington v. Cussons*, 24 W. R. 881; 20 S. J. 704.

(c) 3 Ch. D. 106; 24 W. R. 816; *ante*, p. 264.

(d) 1 Ch. D. 85; 45 L. J. Ch. D. 104; 24 W. R. 56; 20 S. J. 47.

RULES OF
COURT.**Ord. 34.**Amendment of
15 & 16 Vict.
c. 76, ss. 46-48.

Special cases like those mentioned in this rule were allowed at law under the Common Law Procedure Act, 1852, ss. 46-48, and R. G. H. 1862; but in special cases hitherto the Court would not draw any inferences of facts unless a power were expressly given in the case and accepted by the Court (*a*), and where there was conflicting testimony the Court has refused to allow a case in which such a power was expressly given it (*b*) to become a precedent. It is however submitted that the present rule will bind the Court to draw inferences of fact, whether the evidence be contradictory or not, if such a matter be submitted to it.

By 17 & 18 Vict. c. 125 (Common Law Procedure Act), 1854, s. 32, power was given to bring error on a special case as on a judgment on a special verdict; this power is now gone, as error is abolished, but it is submitted appeal may be on a special case as on any other proceeding.

[RULE II.]

If Court or Judge think question of law should be decided before evidence given, they may direct question to be raised by special case or otherwise, and stay unnecessary proceedings in meantime.

2. If it appear to the Court or a Judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a Referee or an Arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

Application for a special case under this rule was refused where the dispute seemed to the Judge to depend on a question of fact (*c*). The Master of the Rolls seems to have made the first order under this rule, and directed a matter of law to be tried on bill and answer (*d*). This rule does not allow a trial on hypothetical facts, as if on demurrer, with power reserved to dispute facts afterwards (*e*); see also O. XL., r. 8. An order under this rule may be made before statement of claim delivered, if it be clear that the point of law should be decided before the rest of the case (*f*); with reference to this rule, notice may be directed to *Lascelles v. Butt*, where it was suggested that this rule might have been used (*g*). This rule has reference only to a case where the action has not yet come on for trial, but by analogy to it the Court will at the trial of an action involving questions of law and fact, decide the question of law first if it

(*a*) *Doe v. Crisp*, 8 A. & E. 779.

(*b*) *Brockbank v. Anderson*, 7 M. & G. 295.

(*c*) *Anon.*, W. N. 1875, 200; 20 S. J. 32.

(*d*) 20 S. J. 46.

(*e*) *Republic of Bolivia v. Bolivian Navigation Co.*, W. N. 1876, 77; 24 W. R. 361.

(*f*) *Metropolitan Board of Works v. New River Co.*, 1 Q. B. D. 727; 45 L. J. Q. B. D. 759; on appeal, 2 Q. B. D. 67; 46 L. J. (App.) Q. B. D. 183; 35 L. T. N. S. 589; 25 W. R. 175.

(*g*) 2 Ch. D. 588; 35 L. T. N. S. 122; 24 W. R. 659.

shall appear that the decision of such question may render it unnecessary to try the question of fact (a); see on this rule also *Jenny v. Bell* (b).

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[RULE III.]

3. Every special case shall be printed by the plaintiff, and signed by the several parties or their solicitors, and shall be filed by the plaintiff. Printed copies for the use of the Judges shall be delivered by the plaintiff.

Special cases to be printed by plaintiff and signed.

This rule is referred to in the additional rules of Court, 12th August, 1875, O. IV., which see.

That rule applies the rule in the text to special cases under Sir George Turner's Act, 13 & 14 Vict. c. 35, and therefore signature of counsel is now unnecessary in special cases under that Act (c).

4. No special case in an action to which a married woman, infant, or person of unsound mind is a party shall be set down for argument without leave of the Court or a Judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true.

[RULE IV.]

Special case in which party under disability not to be set down without leave. Leave how obtained.

5. Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 13 in Appendix (B.) hereto, and also if any married woman, infant, or person of unsound mind be a party to the action, producing a copy of the order giving leave to enter the same for argument.

[RULE V.]

Entry for argument. Form of memorandum of entry.

ORDER XXXV.

Ord. 35.

PROCEEDINGS IN DISTRICT REGISTRIES.

The original r. 1 under this Order has been annulled, and the following substituted by the rules of the Supreme Court, June, 1876 :—

Order XXXV., Rule I., of "The Rules of the Supreme Court" is hereby annulled, and the following shall stand in lieu thereof :—

1. Where an action proceeds in the district registry all proceedings, except where by any of the rules of the Supreme Court it is otherwise provided, or the Court or a Judge shall otherwise order, shall be taken in the district registry, down

[RULE I.]

Where action proceeds in district registry all proceed-

(a) *Pooley v. Driver*, 5 Ch. D. 458.

(b) 2 Ch. D. 547; 45 L. J. Ch. D. 369; 34 L. T. 485.

(c) *Hare v. Hare*, W. N. 1876, 44; 20 S. J. 272.

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Ord. 35.

[RULE I.]

ings, down to and including final judgment to be in district registry. If plaintiff entitled to judgment or order by default, to be entered in district registry in proper book, as in London. Where plaintiff entitled to interlocutory judgment, such judgment, and when damages assessed, final judgment to be entered in district registry.

to and including final judgment, and every final judgment and every order for an account by reason of the default of the defendant or by consent shall be entered in the district registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London.

Where the writ of summons is issued out of a district registry and the plaintiff is entitled to enter interlocutory judgment under Order XIII., Rule 6, or where the action proceeds in the district registry and the plaintiff is entitled to enter interlocutory judgment under Order XXIX., Rule 4 or 5, in either case such interlocutory judgment, and when damages shall have been assessed, final judgment shall be entered in the district registry, unless the Court or Judge shall otherwise order.

Where an action proceeds in the district registry, final judgment shall be entered in such registry, unless the Judge at the trial or the Court or a Judge shall otherwise order.

Actions in the Queen's Bench, Common Pleas, and Exchequer Divisions shall be entered for trial with the Associates and not in the district registries.

Under the original rule the case of *Oger v. Bradnum* (a) was decided, and it does not seem it would be otherwise decided under the present rules.

In *Irlam v. Irlam* the cause came on for further directions before Hall, V.-C. Minutes were prepared, providing, "Let the district registrar at Liverpool tax the costs of all parties of this action." The Vice-Chancellor refused to insert the words, adding, that it was only in simple cases where the district registrar had power of entering final judgment that costs should be taxed by the district registrar (b). District registrars have no jurisdiction to appoint receivers or direct banking accounts to be opened, unless under Judge's order specially directing accounts to be taken in district registry (c). This seems against the opinion of Hall, V.-C., but in the judgment of the Court of Appeal a district registrar may be directed to hold the sale of property directed to be sold (d). See with reference to this rule, *Brassington v. Cussons* (e).

[RULE II.]

Subject as aforesaid, judg-

2. Subject to the foregoing Rules, where an action proceeds in the district registry the judgment and all such orders

(a) *Ante*, pp. 174, 196; 1 C. P. D. 334; 45 L. J. C. P. D. 273; 34 L. T. N. S. 578; 24 W. R. 404.

(b) 24 W. R. 949; see also the case in 2 Ch. D. 608; 24 W. R. 292; *Day v. Whittaker*, 46 L. J. Ch. D. 680; 36 L. T. N. S. 683; 25 W. R. 767.

(c) *Re Smith's Estate, Hutchinson v. Ward*, *ante*, p. 80; W. N. 1877, 67; 36 L. T. N. S. 178; 25 W. R. 452.

(d) *McDonald v. Foster*, on appeal, W. N. 1877, 137; 25 W. R. 687; 21 S. J. 630, 687.

(e) *Ante*, p. 353; 24 W. R. 881; 20 S. J. 704.

therein as require to be entered, except orders made by the district registrar under the authority and jurisdiction vested in him under these Rules, shall be entered in London, and an office copy of every judgment and order so entered shall be transmitted to the district registry to be filed with the proceedings in the action.

See with reference to this rule also, *Irlam v. Irlam* (a).

3. Where an action proceeds in the district registry all writs of execution for enforcing any judgment or order therein shall issue from the district registry, unless the Court or a Judge shall otherwise direct. Where final judgment is entered in the district registry costs shall be taxed in such registry unless the Court or a Judge shall otherwise order.

See with reference also to this rule the same cases last cited (a). On appearance to a judgment summons issued by the registrar of Preston, Quain, J., refused to hear the parties, as a district registrar has no power to issue a judgment summons (b).

4. Where an action proceeds in a district registry the district registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a Judge at chambers, except such as by these Rules a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions is precluded from exercising.

The district registrar has no power to make administration decree on summons (c).

In *Lloyd v. Smith* (d), an administration action was commenced in the Liverpool district registry, Hall, V.-C., remarked that a decree had been referred to ordering accounts to be taken before the district registrar. No such decree however could be found, and unless there was some decree by the Judge, or some explanation given, the taking of accounts by the district registrar was wholly irregular. But not only had the accounts been taken apparently without any direction, but a sale had been ordered, and a receiver appointed, and money had been received by the so-called receiver, and paid probably into some bank. All this had been done without the slightest authority to do anything of the kind; for it was on the contrary expressly provided, by r. 4, that the district registrar should only have the powers of Masters. His Lordship said that unless it could be shown that some decree had been made to have the accounts and inquiries

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ment and other orders, except as otherwise fixed by rules, to be entered in London, and copy transmitted to district registry.

[RULE III.]

Writs of execution to issue from district registry.

[RULE IV.]

District registrar to have authority of Judge at chambers, except such as Master of Queen's Bench, Common Pleas, or Exchequer Divisions is precluded from exercising.

(a) 2 Ch. D. 608; 24 W. R. 292, 949; see also *Day v. Whittaker*, 36 L. T. N. S. 683; 25 W. R. 767.

(b) *Anon.*, 20 S. J. 122.

(c) *Walker v. Robinson*, W. N. 1876, 80; 34 L. T. N. S. 229; 24 W. R. 137, 427.

(d) 21 S. J. 417.

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taken by the district registrar, he should send the action into his Chambers, and have the accounts and inquiries commenced *de novo*. He would adopt those which had been taken as far as he could, but would not do so on a future occasion, as this was not the first time he had been asked to take this course, and it would never do to allow such a practice to grow up. Even if there had been an order to take the accounts, all the other proceedings had been most irregular. See further on similar matter, *McDonald v. Foster (a)*.

[RULE V.]

Applications to
district regis-
trar how made.

5. Every application to a district registrar shall be made in the manner in which applications at chambers are directed to be made by these Rules.

The rules as to these applications are O. LIV., rr. 2, 2a.

[RULE VI.]

Registrar may
refer to Judge,
who may dis-
pose of matter
or refer back to
registrar with
directions.

6. If any matter appears to the district registrar proper for the decision of a Judge, the registrar may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the registrar with such directions as he may think fit.

The Registrar cannot refer to Judge under this Rule, unless summons has been taken out, calling on the other side to appear before the Registrar (*b*).

[RULE VII.]

Appeal to
Judge even
where jurisdic-
tion of registrar
only by con-
sent.

By summons
within four
days from de-
cision com-
plained of.

7. Any person affected by any order or decision of a district registrar may appeal to a Judge. Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the district registrar had jurisdiction only by consent. Such appeal shall be by summons within four days after the decision complained of, or such further time as may be allowed by a Judge or the registrar.

We are informed that Lopes, J., has given notice that in future the summons must be taken out in London. There is no similar provision with regard to appeals from a Master, apparently from an oversight (*c*).

[RULE VIII.]

No stay of
proceedings
unless by
order.

8. An appeal from a district registrar shall be no stay of proceedings unless so ordered by a Judge or the registrar.

Nor from Master, see O. LIV., r. 5.

[RULE IX.]

Officers' pro-
ceedings sub-
ject to control.

9. Every district registrar and other officer of a district registry shall be subject to the orders and directions of the

(a) W. N. 1877, 121 ; 25 W. R. 602 ; on appeal, W. N. 1877, 137 ; 25 W. R. 687 ; 21 S. J. 630 ; *ante*, p. 356.

(b) *Anon.*, W. N. 1875, 250 ; 20 S. J. 142.

(c) W. N. 1875, 240 ; 20 S. J. 122.

Court or a Judge as fully as any other officer of the Court, and every proceeding in a district registry shall be subject to the control of the Court or a Judge, as fully as a like proceeding in London.

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10. Every reference to a Judge by or appeal to a Judge from a district registrar in any action in the Chancery Division shall be to the Judge to whom the action is assigned.

[RULE X.]

References and
appeals in
Chancery.

11. In any action which would, under the foregoing Rules, proceed in the district registry, any defendant may remove the action from the district registry as of right in the cases, and within the times, following :

[RULE XI.]

Defendant may
remove of right
in cases fol-
lowing :

Where the writ is especially indorsed under Order III., Rule 6, and the plaintiff does not within four days after the appearance of such defendant give notice of an application for an order against him under Order XIV. ; then such defendant may remove the action as of right at any time after the expiration of such four days, and before delivering a defence, and before the expiration of the time for doing so :

Where writ
specially in-
dorsed and
plaintiff does
not give notice
of application
for order under
Order 14.

Where the writ is specially indorsed and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to defend in manner provided by Order XIV. ; then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering a defence and before the expiration of the time for doing so :

In like case
where plaintiff
has applied
and defendant
has obtained
leave to defend
under Order 14.

Where the writ is not specially indorsed any defendant may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so.

Where no
special
indorsement.

The following Rule has been here inserted by the Rules of the Supreme Court, December, 1875 :—

11A. In an Admiralty action *in rem*, any person who may have duly intervened and appeared may remove an action from a district registry as of right.

[RULE XI.A.]

In Admiralty
action *in rem*.

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[RULE XII.]

How action
removed.

If defendant
merely formal,
Court or Judge
may order
action to pro-
ceed in district
registry not-
withstanding.

12. Any defendant desirous to remove an action as of right under the last preceding Rule may do so by serving upon the other parties to the action, and delivering to the district registrar, a notice, signed by himself or his solicitor, to the effect that he desires the action to be removed to London, and the action shall be removed accordingly: Provided, that if the Court or a Judge shall be satisfied that the defendant giving such notice is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or Judge may order that the action may proceed in the district registry notwithstanding such notice.

[RULE XIII.]

In any other
case any party
may apply to
Court or Judge
or district
registrar to
remove to
London.

Party to action
proceeding in
London may
apply to Court
or Judge to
remove to dis-
trict registry.

13. In any case not provided for by the last two preceding Rules, any party to an action proceeding in a district registry may apply to the Court or a Judge, or to the district registrar, for an order to remove the action from the district registry to London, and such Court, Judge, or registrar, may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just.

Any party to an action proceeding in London may apply to the Court or a Judge for an order to remove the action from London to any district registry, and such Court or Judge may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just.

An action was commenced in the district registry, marked for the Chancery Division, Bacon, V.-C. The defendant made default in pleading, and the plaintiff, under **O. XXIX., r. 10**, became entitled to set down motion for judgment. Application being made to the Record and Writ Clerks to have the cause put in the Judge's paper, they declined, on the ground that it was not in London, and that they had no power to do so. Bacon, V.-C., ordered the transfer to London, and directed service of the order on the defendant (a). A petition under the Acts for the appointment of new trustees was presented at the Rolls marked "In the Manchester Registry." All the affidavits had been filed in the district registry. The Master of the Rolls held that all the affidavits should be directed to be sent up to London, that proceedings in a district registry were only competent in an "action" (b). A partnership action was commenced in a district registry. No appearance had been entered, and statement of claim had been filed in the district registry. A motion was made that the papers might be sent to London for trial of the action. Hall, V.-C., said he thought the motion not necessary, that the right course was to apply to the District Registrar

(a) *Walker v. Robinson*, W. N. 1875, 245 ; W. N. 1876, 80 ; 34 L. T. N. S. 229 ; 24 W. R. 137, 427.

(b) *Re Gleave's Will*, 20 S. J. 561.

to set down the action on motion for judgment, and the papers would be sent up without further order (a).

RULES OF COURT.

14. Whenever any proceedings are removed from the district registry to London, the district registrar shall transmit to the proper officer of the High Court of Justice all original documents (if any) filed in the district registry, and a copy of all entries in the books of the district registry of the proceedings in the action.

Ord. 35.

[RULE XIV.]

When proceedings removed from district registry to London, district registrar to transmit all original documents, &c.

The following rule has been added to this order by the Rules of the Supreme Court, December, 1875 :—

15. Every district registrar shall account for and pay over to the Treasury all moneys paid into Court at the registry of which he is registrar, in such manner and at such times as may be from time to time directed by the Treasury.

[RULE XV.]

District registrar to account for all monies received.

ORDER XXXVI.

Ord. 36.

TRIAL.

1. There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a Judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a Judge otherwise orders, be the County of Middlesex. Any order of a Judge, as to such place of trial, may be discharged or varied by a Divisional Court of the High Court.

[RULE I.]

No local venue.

If no place named, Middlesex.

Order of Judge may be discharged or varied.

By this rule the entire law of venue is abolished, and it is therefore unnecessary to examine what that law was; but some difficulties have arisen as to trials by jury of Chancery causes. See cases below (b). The general rule would seem to be that in a case which would before the Acts have been properly a case for Chancery, there is no absolute discretion in the parties to elect a jury; but in any action which would not properly have been brought in the Court of Chancery, the parties have an absolute discretion to elect a trial by jury. When an issue in an action in Chancery is to be tried before a jury, the jury is to be empanelled in the ordinary

(a) *Lumb v. Whiteley*, W. N. 1877, 40; 21 S. J. 278.

(b) *Garling v. Royds*, 25 W. R. 123; 21 S. J. 88; *Cave v. Mackenzie*, W. N. 1876, 237, 256; 20 S. J. 744; *Clarke v. Cookson*, 2 Ch. D. 746; 45 L. J. Ch. D. 752; 34 L. T. N. S. 646; 24 W. R. 535; *Warner v. Murdock*, 4 Ch. D. 750; 46 L. J. Ch. D. 121; 35 L. T. N. S. 748; 25 W. R. 207; *ante*, p. 53; *Redmayne v. Vaughan*, 24 W. R. 983; 20 S. J. 744.

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[RULE I.]

course at the commission of assize if in the country, or at *nisi prius* if in London or Middlesex. In an *Anon.* case, on an affidavit that the cause of action arose in Wiltshire, that the defendants resided there, and that cause involved the trial of a local custom, an application to change the venue from Middlesex thither was refused, on the ground that it would cause delay from January to March (*a*). A plaintiff has been held to have now an absolute right to fix the place of trial subject to the defendants showing such a preponderance of convenience in trying elsewhere as to oust that right (*b*). A partnership action commenced in the district registry at Liverpool was assigned to Bacon, V.-C. The plaintiff proposed in his statement of claim that the action should be tried within the hundred of West Derby, *i.e.*, Liverpool. The action being ripe for trial, application was made to the associate at Liverpool, and also to the district registrar to enter the action for trial by judge and jury at the assizes. Each refused, and the plaintiff moved for an order that the action might be entered as above mentioned. Vice-Chancellor Bacon made the order asked for, but declined to give any directions as to the manner in which, or the officers by whom, the cause should be entered for trial (*c*). Formerly the Probate Court was *primâ facie* the proper place for the trial of an action in that Court. This is now altered: the plaintiff has a right to choose the venue unless otherwise ordered; he has not, however, any right to depart from his election when made (*d*). Parties in Probate actions have now, when plaintiffs, power at the commencement of proceedings to claim right of trying cause elsewhere than in Westminster; but on any question as to the matter, the Court is in the same position as formerly, and must determine the balance of convenience and inconvenience. Some weight will be attached to the fact that the plaintiff having had the choice of another locality, had not exercised it in his statement of claim (*e*). Where the trial is merely a question of fact, one counsel only on each side will be heard (*f*).

[RULE II.]

How actions
to be tried or
heard.

2. Actions shall be tried and heard either before a Judge or Judges, or before a Judge sitting with assessors, or before a Judge and Jury, or before an official or special Referee, with or without assessors.

Five modes of
trial.

Five modes of trial are here specified: judge or judges alone (1); judge with assessors (2); judge with jury (3); referee special or official with assessors (4); and referee special or official without assessors (5). It would seem at first sight from this that in no case is there in future to be what was called a trial at bar, involving a plurality of judges along with a jury; but the 7th Rule of this Order makes provision in special cases for more judges than one with a jury, and it would seem that no one but a judge is to sit with a jury, nor are assessors ever to sit in addition to a jury. By the Common Law Procedure Act, 1854, s. 1, it was provided that by consent of parties with certain restrictions, the judges might without a jury try issues of fact; and by s. 6 power was given to refer matters of account to arbitration, to an arbitrator appointed

17 & 18 Vict.
c. 125, ss. 1, 3,
and 6.

(*a*) *Anon.*, 20 S. J. 122. See more particularly r. 26.

(*b*) Per Denman, J., *Plum v. Normanton Iron, &c., Co.*, W. N. 1876, 105; 20 S. J. 340.

(*c*) *Redmayne v. Vaughan*, 24 W. R. 983; 20 S. J. 744; see also other cases cited on page 361, note b.

(*d*) *Hooper v. Braund*, 20 S. J. 373.

(*e*) *Ridge v. Ridge*, 35 L. T. N. S. 428; 20 S. J. 586.

(*f*) *Conington v. Gilliat*, 1 Ch. D. 694; 45 L. J. Ch. D. 273; 34 L. T. N. S. 123; 24 W. R. 269.

by the parties, or to an officer of the Court, or in country causes to a County Court judge (*a*), whose award was to be enforceable like the verdict of a jury in the same case. Sect. 3 allowed a similar reference of the whole case before trial, where the whole case consisted of matters of account.

The mode of trial is a matter peculiarly within the discretion of the Court of first instance, and the Court of Appeal will be very slow to interfere with it (*b*). Where the plaintiff gives notice of trial before a judge sitting with assessors, the defendant has a right under the next rule, by giving notice as therein mentioned, to insist on trial before judge and jury, and cannot be deprived of this right (*c*); but this does not interfere with the rule before stated, *ante*, p. 361, that where the case is one which before the Acts would have been proper for Chancery, the discretion reserved by r. 26 remains in the Court (*d*). In *Carlile v. Bush* (*e*), Vice-Chancellor Hall held that the Court could refer the whole action in cases where neither party had exercised a right reposed in them of insisting on a jury, *i.e.*, in all cases except where a party having such a right had exercised it. If there were no such power, the terms of r. 2 or r. 30 he thought were not satisfied.

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[RULE II.]

3. Subject to the provisions of the following Rules, the plaintiff may, with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of the modes mentioned in Rule 2; and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow, to the effect that he desires to have the issues of fact tried before a Judge and Jury be entitled to have the same so tried.

[RULE III.]

Plaintiff, with
reply, to give
notice of mode
of trial.

Defendant
may, within
four days of
notice, elect to
have issues of
fact tried by
Judge and
Jury.

This Rule seems to give the defendant an absolute right to elect as a mode of trial a judge and jury, and this has been held to be so with regard to strictly common law actions (*e*); but where the action is one which before the Acts would have been properly brought in Chancery, the discretion of the Court given by r. 26 is preserved, and there is no absolute discretion in the parties to countervail it (*f*). But in a case proper for a jury, the Court will so direct if the party having the choice under this rule has requested a jury (*g*). An application by the defendants that the issues of fact in a suit and cross suit might be tried before a judge and jury, was refused by the Vice-Chancellor; who said that as there were mixed questions of law and fact, it would be premature to direct issues until the case was gone into on the hearing, and that he should reserve the discretion given to him

(*a*) This portion of the clause was repealed by 21 & 22 Vict. c. 74, s. 5, as to reference to County Court Judge of any cause.

(*b*) *Lascelles v. Butt*, 2 Ch. D. 588; 35 L. T. N. S. 122; 24 W. R. 659.

(*c*) *Sugg v. Silber*, 1 Q. B. D. 362; 45 L. J. Q. B. D. 460; 34 L. T. N. S. 682; 24 W. R. 640.

(*d*) See in addition to other cases *Back v. Hay*, 5 Ch. D. 235; 36 L. T. N. S. 295; 25 W. R. 392.

(*e*) 21 S. J. 650.

(*f*) See *Garling v. Royds*, 25 W. R. 123; 21 S. J. 88; *West v. White*, 4 Ch. D. 631; 46 L. J. Ch. D. 333; 36 L. T. N. S. 95; 25 W. R. 342; *Head v. Ryde*, 21 S. J. 297; *Sykes v. Firth*, W. N. 1877, 38; 46 L. J. Ch. D. 627; *Back v. Hay*, 5 Ch. D. 235; 36 L. T. N. S. 295; 25 W. R. 392; *Pilley v. Baylis*, 5 Ch. D. 241; 36 L. T. N. S. 296.

(*g*) *Bordier v. Burrell*, 5 Ch. D. 512; 46 L. J. Ch. D. 615; 25 W. R. 801.

RULES OF
COURT.**Ord. 36.**[RULE III.]
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under r. 26 (a). Notwithstanding this Rule a reply may be entirely special (b). In *Leigh v. Brooks*, before cited (c), application being made to refer the trial of an action to an official referee before notice of trial given, Hall, V.-C., held that he was precluded from so doing by this rule, which gives the defendant an absolute right to elect trial by judge and jury. In an action in the Chancery Division to restrain the obstruction of light and air, the plaintiff had given notice of trial before a judge in Middlesex, and the defendant had given notice under this rule to have issues of fact tried before a special jury; a motion was made that notwithstanding the defendant's notice, the action and issue might be tried by the Vice-Chancellor alone; a mandatory injunction was claimed, but resisted, as the building was completed before the issue of the writ. The Vice-Chancellor refused to interfere with the right of the defendant to have the damages assessed by a jury; saying that if the plaintiff thought himself entitled to an injunction, he could get it on motion for judgment. He directed issues whether the defendant had sustained any and what damages, to be tried by a special jury in London, and would direct none as to the defendant's conduct (d). In *Wood and Ivery v. Hamblet* (e), the Master of the Rolls decided that referring to this rule, rr. 8 and 29a, the Court has power to direct an action as well as a question or issue of fact to be tried at the assizes; and though he thought the wish alone of the parties was not a sufficient reason for such an order, yet in the case in question, as they did wish it, and the action was for damages only to land in Staffordshire, and would require a great many local witnesses, he made an order for trial at the Staffordshire assizes, and ordered that these reasons should be stated on the face of the order. See on this rule also *Clarke v. Cookson* (f).

In reference to this rule the following notice has been published in the Registrar's Office of the Chancery Division:—

"TRIALS BEFORE A JUDGE AND JURY IN CHANCERY ACTIONS.—
NOTICE.

"In actions assigned to the Chancery Division when the plaintiff under Order XXXVI., Rule 3 of the Rules of the Supreme Court gives notice of trial before a judge and jury, the action is to be entered for trial with the Associates instead of with the Chancery registrar.

"Where after the plaintiff has given notice of trial in any other manner and has set down the action in the Chancery Division the defendant has under the provisions of the same rule, given notice that he desires to have the issues of fact tried before a judge and jury, the action will be marked in the Cause Book 'Jury Trial at Defendant's instance' on the request of the solicitor for either party, and on the certificate of such solicitor, that such notice has been duly given within the time, or extended time, referred to in Rule 3.

"Actions which have been so marked will be added by the Associates to their list of actions for trial, upon the solicitor for either party bringing to them the certificate of the Chancery Registrar in the form

(a) *Swindell v. Birmingham Syndicate*, 3 Ch. D. 127; 45 L. J. Ch. D. 756; 35 L. T. N. S. 111; 24 W. R. 911; see also *Rowe v. Jacob*, 20 S. J. 704.

(b) *Hall v. Eve*, 4 Ch. D. 341; 46 L. J. Ch. D. 145; 35 L. T. N. S. 926; 25 W. R. 177.

(c) *Ante*, p. 77; 21 S. J. 297. On appeal, 5 Ch. D. 592; 46 L. J. Ch. D. 344; 25 W. R. 401.

(d) *Burrell v. Cartwright*, 21 S. J. 238.

(e) W. N. 1877, 166.

(f) 2 Ch. D. 746; 45 L. J. Ch. D. 752; 34 L. T. N. S. 646; 24 W. R. 535.

given below, annexed to the statement of claim. Such actions will be placed in the list in the order in which they are entered with the Associates.

" R. H. LEACH,
" *Senior Registrar.*

" CHANCERY REGISTRAR'S OFFICE,
" *February, 1877.*

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[RULE III.]

" [*Reference to Record, and Short Title*].

" I CERTIFY that this action was entered for trial in the Cause Book of the Chancery Division on the day of , and that it has been this day marked 'Jury trial at Defendant's instance,' in accordance with a notice given by the defendant under Order XXXVI., Rule 3, of the Rules of the Supreme Court.

" Dated the day of
" *For the Senior Registrar.*"

A plaintiff in Chancery filed his Bill before the Judicature Acts came into operation for specific performance, which he afterwards amended, and finally, under the practice mentioned in this notice, gave notice of trial before judge and jury, and entered the action with the Associates. On motion, the Vice-Chancellor said that though the plaintiff had a right to name the mode of trial he preferred, he could not take away the authority of the Court under r. 26 to order the trial before itself without a jury in proper cases, and that the notice above mentioned could only be intended to apply to actions proper to be tried before a jury, and he directed the cause in question to be tried before himself without a jury (*a*).

4. Subject to the provisions of the following Rules, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a Court or Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, and thereby specify one of the modes mentioned in Rule 2; and in such case the plaintiff, on giving notice within the time fixed by Rule 3 that he desires to have the issues of fact tried before a Judge and Jury, be entitled to have the same so tried.

[RULE IV.]

If plaintiff do not, in due time, give notice of trial, defendant may give notice, &c.

Under the law hitherto where there was more than one defendant, and they had severed in their pleadings, time did not begin to run against the plaintiff, as to notice of trial, until issue had been joined as to all (*b*), or they had been got rid of from the record, though some had been discharged under the Bankruptcy Acts (*c*), or had died (*d*); nor where there were several issues of fact, did time begin to run until there was joinder in all (*e*), and where there was a demurrer as well as an issue in fact, the plaintiff had the option subject to the discretion of the Court or

Under former law when time began to run against plaintiff as to notice of trial.

- (a) *Pilley v. Baylis*, 5 Ch. D. 241; 36 L. T. N. S. 296.
- (b) *Crowther v. Duke*, 7 D. P. C. 409.
- (c) *Jackson v. Utting*, 10 M. & W. 640.
- (d) *Pinkus v. Sturch*, 5 C. B. 474.
- (e) *Wright v. Oldfield*, 8 D. P. C. 899.

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COURT.**Ord. 36.**

[RULE IV.]

a Judge to try whichever he pleased first, and could not be compelled to proceed on the latter until the former had been determined (a).

In the case of *Litton v. Litton* before cited (b), defendant had stated a defence which, if unanswered, was good; the plaintiff had allowed three weeks to elapse without delivering reply or obtaining extension of time; an attempt was made before the expiration of the six weeks mentioned in the rule, to obtain an order dismissing the action with costs under **O. XL., r. 11**, as on confession of defence. Hall, V.-C., held that the proper course would be for the defendants to give notice of trial, if the plaintiff did not within the time limited by the order, give such notice, or they might (under r. 4a, presently set out), instead of giving notice, apply to the Court to dismiss, for want of prosecution. In *Cooper v. Castle*, the delivery of a reply was held to close the pleadings, and that the six weeks within which the plaintiff ought to have given notice of trial ran from that date, though defendant was in default by not producing documents which he had been ordered to produce (c).

The following rule has been added by the Rules of the Supreme Court, June, 1876:—

[RULE IVA.]

Defendant may, instead of giving notice of trial, apply to Court or Judge to dismiss action for want of prosecution.

4A. The defendant, instead of giving notice of trial, may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or Judge may seem just.

See on this rule also *Cooper v. Castle*, last cited.

[RULE V.]

Where neither party has given notice under rules to have trial before Judge and Jury, &c.

5. In any case in which neither the plaintiff nor defendant has given notice under the preceding Rules that he desires to have the issues of fact tried before a Judge and Jury, or in any case within the 57th section of the Act, if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the Court or a Judge for an order to that effect, within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow.

In the case of *Sugg v. Silber*, the Judge had made an order for trial before a judge and assessors. It appeared that the defendant had given notice under r. 3 for trial before a judge and jury. Held, that defendant had a right to insist on trial by jury, and that his notice held

(a) *Duberley v. Page*, per Buller, J., 2 T. R. 394; *Ferguson v. D'Arcy Mahon*, 2 Jur. 820.

(b) *Ante*, p. 281; 3 Ch. D. 793; 46 L. J. Ch. D. 64; 24 W. R. 962.

(c) 21 S. J. 457.

good (a). An application out of time under this rule for which no extension of time has been obtained will not be received with favour (b).

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[RULE VI.]

Subject as above, Court or Judge may at any time in an action order that different questions may be tried in different ways, &c.

6. Subject to the provisions of the preceding Rules, the Court or a Judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others.

On this rule see *Liverpool, Brazil, and River Plate Steam Navigation Co. v. St. Katherine Steam Navigation Co.* (c). An order will not be made for severance of issues where such severance would be injurious to one of the parties (d). See also with reference to this rule *Sugg v. Silber* before cited (a).

7. Every trial of any question or issue of fact by a jury shall be held before a single Judge, unless such trial be specially ordered to be held before two or more Judges.

[RULE VII.]

Trial by jury to be before one Judge unless more specially appointed.

In such case one counsel only on each side will be heard (e).

This and the r. 6 have already been noticed in the notes on rr. 2 and 3 of this Order.

8. Notice of trial shall state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is entered for trial. It may be in the Form No. 14 in Appendix (B.), with such variations as circumstances may require.

[RULE VIII.]

Notice of trial to state whether of action or of issues, and in actions in Common Law divisions, place and day for which entered.
Form of notice.

This rule has been amended by the Rules of the Supreme Court, December, 1875, as follows:—

8A. Order XXXVI., Rule 8, of "The Rules of the Supreme Court," shall be read as if the words "to be" had been inserted before the words "entered for trial."

[RULE VIII A.]

See *Wood and Ivory v. Hamblet* (f).

(a) *Sugg v. Silber*, 1 Q. B. D. 362; 45 L. J. Q. B. D. 460; 34 L. T. N. S. 682; 24 W. R. 640.

(b) *Lascelles v. Butt*, 2 Ch. D. 588; 35 L. T. N. S. 122; 24 W. R. 659.

(c) W. N. 1875, 203; 20 S. J. 55.

(d) *Millissich v. Lloyds*, W. N. 1875, 200.

(e) *Conington v. Gilliat*, 1 Ch. D. 694; 45 L. J. Ch. D. 273; 34 L. T. N. S. 123; 24 W. R. 269.

(f) *Ante*, p. 364; W. N. 1877, 166.

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[RULE VIII.]

Where notice
misleading
action formerly
set aside.

But not unless
party was pro-
bably misled.

Service of
notice of trial.

It is in this Rule stated that the form given *may* be used, but does not positively direct that it *shall* be used. It is submitted, therefore, that though prudent to use the form given, any form containing the requisites of the rule would be valid; this was undoubtedly so hitherto (a). But where the notice, either from informality or from other causes was of a nature to mislead the party served with it, the trial was usually set aside on motion properly made for that purpose. Where the notice specified "Guildhall, Westminster," as the place of trial, and the defendant swore he attended there, and was misled, the Court set aside the verdict (b). And where the issue which had been delivered indorsed with a notice of trial for the sittings after Easter Term having been returned pending a negotiation for settlement was, on the negotiation going off, redelivered in the same form, the old notice not being struck out, but accompanied with a notice of trial on a separate paper for the sittings after Trinity Term when the cause was tried, the verdict was set aside for the irregularity of giving two notices of trial for different days (c). But where a notice of trial had been originally drawn, dated 2nd April, for the first sittings in *next* Easter Term, but was not delivered till the 18th April, and was then for the second sittings in *next* Easter Term, the attorney having by mistake omitted to erase the word "next," and a verdict was obtained against the defendant at the second sittings in the then current term, the Court of Queen's Bench refused to set it aside on the ground that the defendant had not been misled (d).

Care should be taken as to a service of notice of trial. If the defendant appear by attorney, it ought to have been given to him, or to the town agent, if there were one, but this was under the former practice, when it was a rule that "notice of trial and of continuance of trial or inquiry should be given in town" (e), it does not now appear clear, where the proceedings are in a district registry, whether notice of trial should or should not be given in town; it is submitted that as nothing seems said against it, the old practice will still hold, and wherever the notice is to be in town, the old practice, under the rule above cited, R. G. H. 1853, Rule 34, will probably still apply, and care should be taken that the notice be delivered to the attorney or agent in the case himself, or some authorized agent. Service on a laundress at the chambers was held insufficient (f), and leaving it at a place directed by a notice on the door was held insufficient, unless it were shown from the subsequent statement of the person with whom it was left, that the principal received it. If the residence cannot be found, it will be advisable, besides leaving a copy at the last place mentioned in the master's book, to serve a duplicate on the defendant himself (g), or his attorney in the country, as the case may be. Where the defendant, appearing in person, desired the plaintiff's attorney to put the notice of trial under his office door for fear of alarming his wife, and the attorney did so, the service was holden insufficient, the defendant having sworn that it never came to his hand, possession, or knowledge (h). In one case the Court of Common Pleas set aside a notice of trial given by the

(a) See *Henbury v. Rose*, 2 Str. 1237; *Tyte v. Sterenton*, 2 W. B. 1298; *Boyes v. Twist*, Barnes, 292; *Ginger v. Pycroft*, 5 D. & L. 554; *Cory v. Hotson*, 1 L. M. & P. 23; see also *Wyatt v. Stocken*, 6 A. & E. 803.

(b) *Cross v. Lang*, 1 D. P. C. 342.

(c) *Kerry v. Reynolds*, 2 C. M. & R. 310.

(d) *Fenn v. Green*, 6 E. & B. 656; reversing *Benthall v. West*, 1 D. & L. 599, in Ex.

(e) R. G. H. 1853, r. 34.

(f) *Brown v. Wildbore*, 1 M. & G. 276; *Peddie v. Pratt*, 7 Sc. N. R. 894, 6 M. & G. 950, marginal note incorrect.

(g) *Higgins v. Stuart*, Cooke, C. P., 3rd ed. 94.

(h) *Fry v. Mann*, 1 D. P. C. 419.

attorney in the cause, because he had neglected to renew his certificate (a), but at that time the want of a certificate rendered the admission null.

A valid notice of trial compelled the defendant, under peril of the costs of the day (b), to try at the time specified, unless it were either countermanded or continued, the obligation could not be got rid of by giving another notice for a future day (c), but where the notice was given for a day on which there was no sitting, and the plaintiff without countermanding it gave another which was good, it was holden that as the first was a nullity it required no countermand (d). But the Court had a discretion in allowing the costs of the day, and, where by the refusal of the defendant without any reason to allow a cause to be re-entered after the plaintiff had withdrawn the record, the cause was not tried, the Court refused to allow him his costs (e). So where a defendant gave a consent to a Judge's order for judgment, attested by an attorney, but not his attorney on the record, and on the evening of the day before trial revoked his consent, the Court refused him the costs of the day (f). Where neither party appeared at the trial, and the cause was in consequence struck out, it was said by Parke, B., that if the defendant could show that any costs had been incurred by the default he ought to have them (g), but where the defendant failed to appear, and the plaintiff who appeared did not proceed and the cause was struck out, the Court refused the defendant his costs, saying it was his own fault if any had been uselessly incurred, as he might have attended and nonsuited the plaintiff (h), and so where he did appear but did not nonsuit the plaintiff (i), and where a defendant attended and nonsuited the plaintiff in his absence but omitted to have the jury sworn, and on the plaintiff subsequently appearing the error was discovered, and the Judge, after some delay to give the defendant a chance of appearing, ordered the cause to be struck out, the Court refused him the costs of the day, as it was his own fault that he had not obtained a valid nonsuit (k). The costs allowed were only those actually incurred on the day on which the default was made; where a cause was made a remanet, and at the next sittings the plaintiff withdrew the record, it was held that the defendant was not entitled to costs for the first sittings (l).

A rule for costs of the day for not proceeding to trial, pursuant to notice, or not countermanding in sufficient time, might be drawn up on affidavit without motion (m). The costs of the day for not proceeding to trial or to execute a writ of inquiry might be obtained by a side bar rule on the usual affidavit (n). The affidavit need not have shown that costs had actually been incurred, it was sufficient to state the commencement of the action, the joinder of issue and notice of trial, and that plaintiff did not proceed to trial or countermand notice (o). If the rule were obtained

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[RULE VIII.]

Effect of notice of trial.

Where no sitting on day of notice, notice a nullity.

Discretion of Court as to costs.

What costs allowed.

How rule obtained.

Effect of affidavit.

(a) *Patterson v. Powell*, 9 Bing. 620.

(b) See *Skinner v. The London, Brighton, and South Coast Railway Co.*, 4 Ex. 885.

(c) But see *Ranger v. Bligh*, 5 D. P. C. 235.

(d) *Fell v. Tyne*, 5 D. P. C. 246.

(e) *Pope v. Fleming*, 5 Ex. 249; but see *Cook v. Smith*, 1 Dowl. N. S. 861.

(f) *Samuel v. Bate*, 28 L. J. Ex. 39.

(g) *Allott v. Bearcroft*, 4 D. & L. 327; see *Warne v. Hill*, 7 C. B. N. S. 730, per Williams, J.

(h) *Morgan v. Fernyhough*, 11 Ex. 205.

(i) *Smith v. Marshall*, 33 L. J. Q. B. 332.

(k) *Warne v. Hill*, 7 C. B. N. S. 726; *Haworth v. Whalley*, 1 C. & K. 586.

(l) *Brett v. Stone*, 1 D. & L. 140.

(m) 15 & 16 Vict. c. 76, s. 99.

(n) R. G. H. 1853, r. 39.

(o) *Powell v. James*, 12 M. & W. 100.

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[RULE VIII.]

—

the course was for the plaintiff to move to discharge it if he had grounds for so doing (*a*). The rule was not drawn up with a stay of proceedings (*b*) till costs were paid. If hindered by a *ne recipiatur* from trying at the sittings for which notice was given, the plaintiff had to give a fresh notice of trial (*c*).

Notice of trial is never to be given now unless intended to be acted on, and is merely for the purpose of keeping the cause in the list (*d*). See under this rule, also, *Clarke v. Cookson*, hereafter cited (*e*).

[RULE IX.]

Ten days
notice of trial,
unless short
notice accepted.
Short notice
four days.

9. Ten days notice of trial shall be given, unless the party to whom it is given has consented to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge. Short notice of trial shall be four days notice.

A notice of trial defective as giving too short a time, was not waived by the defendants keeping it and forbearing to object (*f*), and a trial had thereon might be set aside in ordinary cases at any time before execution (*g*). Any irregularity in mere form or delivery must have been noticed within a reasonable time (*h*), and was waived by any subsequent step taken by the defendant, *e.g.*, by an application to the Judge to strike out the cause (*i*), or by appearing (*k*). In the case last cited, indeed, under the special circumstances a new trial was granted. If the cause has been tried on the irregular notice, motion to set it aside must have been made within the time limited for applying generally for a new trial (*l*), but now this is provided for by r. 20, *post*, p. 374, in cases where one party has not appeared.

By analogy to this rule, Vice-Chancellor Hall, in *Lowndes v. Thomas*, directed ten days notice to be given to the defendant to set down action on motion for judgment, on default of pleading where the defendant was in default, by want of answer, O. XXIX. and O. XL. being silent on the matter (*m*). But in *Roupell v. Parsons* (*n*), the same Judge seems to have held two days sufficient notice. However, the Master of the Rolls in *Hall v. Snelling* (*o*), dissented from *Roupell v. Parsons* (*n*), and seems to have confirmed *Lowndes v. Thomas* (*m*).

[RULE X.]

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10. Notice of trial shall be given before entering the action for trial.

(*a*) See *Warne v. Hill*, 7 C. B. N. 8. 726.

(*b*) *Shoredicke v. Gilbard*, 8 D. P. C. 296; *Aime v. Chinnock*, 8 D. P. C. 736; *Friden v. Bray*, 9 D. P. C. 329; *Rose v. Macgregor*, 12 M. & W. 517.

(*c*) *Fitch v. Burton*, 2 Dowl. N. S. 958.

(*d*) Per Lush, J., 20 S. J. 81.

(*e*) *Post*, pp. 371-373; 2 Ch. D. 746; 45 L. J. Ch. D. 752; 34 L. T. N. S. 646; 24 W. R. 535.

(*f*) *Dynam v. Ibbotson*, 3 M. & W. 431; *Wardle v. Ackland*, 2 D. P. C. 28; *Wood v. Harding*, 3 C. B. 968.

(*g*) *Weight v. Carr*, 2 Jur. 516; *Cotton v. Thompson*, 5 Jur. 270; *Nicholl v. Forshall*, 15 L. J. Q. B. 203.

(*h*) See *Brown v. Wildbore*, 1 M. & G. 276.

(*i*) *Yonge v. Fisher*, 4 M. & G. 814.

(*k*) *Figg v. Wedderburne*, 6 Jur. 218.

(*l*) *Ellaby v. Moore*, 13 C. B. 907.

(*m*) 20 S. J. 272.

(*n*) W. N. 1876, 61; 34 L. T. N. S. 56; 24 W. R. 269.

(*o*) W. N. 1876, 77; 20 S. J. 312.

The following rule has been here introduced by the rules of the Supreme Court, December, 1875 :—

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[RULE XA.]

10A. Unless within six days after notice of trial is given, the cause shall be entered for trial by one party or the other, the notice of trial shall be no longer in force. This rule is not to apply in any case in which notice of trial has been already given or to trials not in London or Middlesex.

Unless cause be entered for trial within six days after notice of trial given, notice of trial shall be no longer in force.

As to these rr. 10 and 10a, see *Garling v. Royds*, 20 S. J. 782.

11. Notice of trial for London or Middlesex shall not be or operate as for any particular sittings; but shall be deemed to be for any day after the expiration of the notice on which the action may come on for trial in its order upon the list.

[RULE XI.]

Notice of trial for London or Middlesex not to operate for any particular sittings.

12. Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given.

[RULE XII.]

Notice of trial elsewhere shall be for first day of next assizes at place.

Nothing seems in these rules to be provided for continuance of notice, which probably by the effect of the rules may be deemed to be rendered unnecessary. It is with diffidence submitted that this is the effect of the rules, and therefore it is unnecessary to touch on the practice as to the continuance of notice. Every postponement of notice must now, it seems, be proceeded with by way of countermand of notice under r. 13 of this Order, which we shall now proceed to consider.

13. No notice of trial shall be countermanded, except by consent, or by leave of the Court or a Judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just.

[RULE XIII.]

No countermand except by consent or by leave.

This rule, which allows no countermand without consent or leave, will, by so doing, do away with a number of decisions which went chiefly to the right to countermand, and whether a supposed exercise of such right were valid or not, as everything is now left to the Court or Judge ordering or allowing the countermand.

In *Clarke v. Cookson*, the plaintiff joined issue after the 2nd Nov., 1875, and gave notice of trial by Judge and jury; he afterwards wished to withdraw his notice as to jury, and to set down the suit in Vice-Chancellor Hall's paper. Defendant opposed the change, and the Vice-Chancellor decided in favour of the defendant (a). But in *Coode v. Harrison* (b), the Lord Chief Justice said that the Judges would not hear cases sent down from the Chancery Division. See, however, cases cited, *ante*, p. 362.

(a) 2 Ch. D. 746; 45 L. J. Ch. D. 752; 34 L. T. N. S. 646; 24 W. R. 535.

(b) 20 S. J. 467.

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[RULE XIV.]

Party giving notice for London or Middlesex omitting to enter for trial, &c.

14. If the party giving notice of trial for London or Middlesex omits to enter the action for trial, on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last Rule, within four days enter the action for trial.

The old rules for entry of trial at London or Middlesex are abrogated by the operation of O. XXXVI. r. 11, as they all refer to entries for a particular sitting in London or Middlesex, to which the notice of trial does not in future refer.

As to this rule, see *Garling v. Royds* (a), *Warner v. Murdock* (b).

[RULE XV.]

On notice elsewhere, either party may enter for trial, &c.

15. If notice of trial is given for elsewhere than in London or Middlesex, either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff's entry.

Old course of practice, R. H. T. 14 G. II., R. G. H. 1853.

At the assizes the course was for the marshal to begin to receive the records, and enter the causes immediately after the commissions had been opened, and by rule H. T. 14 Geo. II., as to which there is some doubt whether it be not repealed by R. G. H. 1853, it was ordered by all the Judges that no record of *nisi prius* should be received at the assizes in any county in England, unless it should be delivered to be entered with the marshal before the first sitting of the Court after the commission day, except in the counties of York and Norfolk, and there the records should be delivered to and entered with the marshal before the first sitting of the Court on the second day after the commission day, otherwise they should not be received.

And that every cause should be tried in the order in which it should be so entered, without any preference or delay, unless it should be made out to the satisfaction of the Judge in open Court that it was impracticable or inconvenient so to do, who thereupon should make such order for the trial of the cause so put off as to him should seem just.

That a list of the causes when so entered as aforesaid should be made by the marshal, and forthwith fixed up in some public place in the Nisi Prius Court, there to remain during the whole time of the assizes.

If record were withdrawn Judge might allow re-entry if *ne recipiatur* were meantime entered.

In accordance with this rule, it was held by Bayley, J., at Worcester (c) that the plaintiff had no right to enter his cause, nor the marshal any authority to receive a record after the sitting of the Court on the day after the commission day without an order for that purpose. But this rule does not seem to be adhered to on all circuits (d). If the record were withdrawn on account of the supposed absence of a witness, the Judge might, if no *ne recipiatur* had been entered in the meantime, allow it to be re-entered if he thought proper (e), but a *ne recipiatur* might be entered immediately, and after that no re-entry could be allowed (f).

Causes entered as undefended were usually taken first, and if sufficient

(a) 25 W. R. 123; 21 S. J. 88.

(b) 4 Ch. D. 750; 46 L. J. Ch. D. 121; 35 L. T. N. S. 748; 25 W. R. 207.

(c) *Skeye v. Voyce*, 3 Camp. 365.

(d) See 1 C. & K. 394, for practice on Oxford circuit.

(e) *Lean v. Smith*, 2 Mo. & Rob. 126.

(f) *Pope v. Fleming*, 3 C. & K. 146.

notice had been given to the defendant in a cause of the intention so to enter it, to enable him to give a counter notice, the trial was held regular, for notwithstanding the above rule, every cause, strictly speaking, was in its turn after the commission day (a).

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16. The list or lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared and the actions shall be allotted for trial without reference to the Division of the High Court to which such actions may be attached.

[RULE XVI.]

Lists of actions
for trial at
London and
Middlesex how
allotted.

Where a trial by jury is from the Chancery Division, the proper officer thereof will, on application, give a certificate of the case being ready for trial, and a request that it be entered in the list, and the plaintiff is to apply to have it entered in the cause list for the Middlesex sittings. If any difficulty be experienced in getting it set down, application is to be first made to Judge in Chambers, and afterwards, if necessary, to the Vice-Chancellor. All difficulty can, however, be avoided, if the parties agree on issues of fact, to be settled by the Vice-Chancellor, and sent by him for trial in Middlesex, under r. 27 (b). No jury is to sit in Chancery, notwithstanding *Cannot v. Morgan* (c). See case before cited (b), the opinion of the Chief Justice in *Coode v. Harrison* (d), before mentioned, seems to be overruled by the cases before mentioned (e).

17. The party entering the action for trial shall deliver to the officer a copy of the whole of the pleadings in the action for the use of the Judge at the trial. Such copy shall be in print, except as to such parts, if any, of the pleadings as are by the Rules permitted to be written.

[RULE XVII.]

This rule has been amended by the rules of the Supreme Court, December, 1875, as follows:—

17A. The first sentence of Order XXXVI., Rule 17, shall be altered as follows:—The party entering the action for trial shall deliver to the officer two copies of the whole of the pleadings in the action, one of which shall be for the use of the Judge.

[RULE XVIIIA.]

Party entering
to deliver to
officer copies of
pleadings.

In the second sentence the word "copies" shall be substituted for "copy."

(a) *Lett v. Watkins*, 27 L. J. Ex. 319.

(b) *Clarke v. Cookson*, 2 Ch. D. 746; 45 L. J. Ch. D. 752; 34 L. T. N. S. 646; 24 W. R. 535; see also *Warner v. Murdock*, ante, p. 361; 4 Ch. D. 750; 46 L. J. Ch. D. 121; 35 L. T. N. S. 748; 25 W. R. 207. See notice, ante, pp. 364, 365.

(c) 1 Ch. D. 1; 45 L. J. Ch. 50; 33 L. T. N. S. 402; 24 W. R. 91.

(d) 20 S. J. 467.

(e) *Cave v. Mackenzie*, W. N. 1876, 237, 256; 20 S. J. 744; *Redmayne v. Vaughan*, 24 W. R. 983; 20 S. J. 744; *Garling v. Royds*, 21 S. J. 88; *Warner v. Murdock*, 4 Ch. D. 750; 46 L. J. Ch. D. 121; 35 L. T. N. S. 748; 25 W. R. 207.

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[RULE XVII.]

The following notice has been published with reference to this rule:—

HIGH COURT OF JUSTICE.—CHANCERY DIVISION.—NOTICE.

"The senior registrar is directed to give notice to solicitors who have causes or actions now standing for hearing or trial in the Chancery Division, or which may be entered for trial before Monday the 23rd instant (April, 1877), that they must have the goodness forthwith to deliver to the registrar, pursuant to **O. XXXVI.**, r. 17, of the Supreme Court of Judicature rules, two copies of the pleadings in every case. And that if such copies are not delivered by Thursday the 26th instant, their cases will not be put in the paper until after they are so delivered. The copies may be left with either of the bag-bearers, at their seat in the office. 2. From and after the 23rd instant, no causes or actions will be entered for trial, unless two copies of the whole pleadings are, pursuant to the rule, delivered to the officer at the same time.

"R. H. LEACH,
"Senior Registrar.

"CHANCERY REGISTRAR'S OFFICE,
"April 19th" (a).

This notice works as it seems thus. The two copies required are, as to cases already entered for trial, to be left with the registrar (at the seat of one of the bag-bearers), before the case will be put in the paper for hearing or trial, and, as to all other cases, at the time when the action is entered for trial. The registrar will hand over one of such copies "for the use of the Judge," and the other to the clerk of records and writs to be filed. So that after this notice it will be unnecessary for the solicitor to file with the clerk of records and writs any copy of the pleadings under **O. XLI.**, r. 1, at the time when the judgment (after trial) is being passed or entered. These remarks do not apply in cases where judgment is being drawn up after trial had before the above notice was issued.

[RULE XVIII.]

When action
called on, if
defendant do
not appear,
&c.

18. If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him.

[RULE XIX.]

If defendant
appear and
plaintiff make
default, &c.

19. If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him.

It seems that, in the case first contemplated by this rule, the jury should not be sworn, notwithstanding the words "upon the findings," occurring in r. 22, which is, however, repealed (b).

[RULE XX.]

20. Any verdict or judgment obtained where one party

(a) 21 S. J. 486.

(b) *Lane v. Eve*, W. N. 1876, 86; 20 S. J. 320; see also *Sullivan v. National Shipping Co.*, 20 S. J. 642; *Farrell v. Wale*, 36 L. T. N. S. 95.

does not appear at the trial, may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex.

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[RULE XX.]

Judgment obtained thus on default may be set aside on terms, &c.

Where defendant had instructed a solicitor to enter appearance and defend an action, and the solicitor, after entering appearance neglected the action, and allowed it to come to trial without communicating with the defendant, or appearing, or instructing counsel to appear at the trial, and the defendant did not ascertain that the action had been tried and judgment recovered against him with costs, until more than six days after the trial, he personally having been guilty of no negligence, and having made application for enlargement of the time within six days of his having heard that the trial had taken place. The Court granted an extension of time to enable him to apply to set aside the judgment (a).

21. The Judge may, if he think it expedient for the interests of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit.

[RULE XXI.]

Judge may postpone or adjourn trial.

Where a case has been remitted for trial to a County Court under 19 & 20 Vict. c. 108, s. 26, the Registrar must certify judgment to the Superior Court, and judgment must be signed according to certificate, and there is no room for motion under this rule or O. XL. r. 1 (b). See on this rule, *Lydall v. Martinson* (c).

22. *This rule is repealed by the rules of the Supreme Court, December, 1876, and the following substituted:—*

[RULE XXII.]

Order XXXVI., Rule 22, is hereby repealed, and instead thereof the following rule shall take effect:—

Upon the trial of an action the Judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge.

Upon trial Judge may at or after trial direct judgment to be entered for either party or adjourn the case for further consideration, &c.

On this rule also see case above cited (b).

23. Upon every trial at the assizes, or at the London and Middlesex sitting of the Queen's Bench, Common Pleas, or Exchequer Division, where the officer present at the trial is not the officer by whom judgments ought to be entered, the associate shall enter all such findings of fact, as the Judge may direct to be entered, and the directions, if any, of the Judge as to judgment, and the certificates, if

[RULE XXIII.]

At assizes, or at London and Middlesex sittings in absence of proper officer associate to enter findings of fact, &c.

(a) *Michell v. Wilson*, 25 W. R. 380.

(b) *Scutt v. Freeman*, 2 Q. B. D. 177; 46 L. J. Q. B. D. 173; 35 L. T. N. S. 939; 25 W. R. 251.

(c) 5 Ch. D. 780; 37 L. T. N. S. 69; 25 W. R. 866.

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[RULE XXIII.]

any, granted by the Judge, in a book to be kept for the purpose.

This rule contains no provision as to jury trials from the Chancery Division (a).

[RULE XXIV.]

Associate's
certificate, &c.

24. If the Judge shall direct that any judgment be entered for any party absolutely, the certificate of the associate to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate may be in the Form No. 15 in Appendix (B.) hereto.

[RULE XXV.]

Entry of judgment, &c.

25. If the Judge shall direct that any judgment be entered for any party subject to leave to move, judgment shall be entered accordingly upon the production of the associate's certificate.

[RULE XXVI.]

When Court or
Judge may
direct trial
without jury,
&c.

26. The Court or a Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury.

With reference to this rule, see cases before mentioned in notes to rr. 1—3.

This rule will cover every cause entered in the Chancery Division, and which before the Acts would have properly been in Chancery (b); and probably all matters which, by virtue of the Common Law Procedure Act, 1854, might be referred to arbitration by the Court without consent. See on this rule also *Sugg v. Silber*, before cited (b); also cases cited (b).

[RULE XXVII.]

Court or Judge
may, either
before or at
trial, order any
issue of fact to
be tried before
jury.

27. The Court or a Judge may, if it shall appear either before or at the trial that any issue of fact can be more conveniently tried before a jury, direct that such issue shall be tried by a Judge with a jury.

An application was made that certain issues in an action, the writ in which was indorsed for Middlesex, should be ordered for trial at the Stafford Assizes, as all parties lived in or near the county of Stafford and expense would be thereby saved, the order was made (d). *Garling v. Royds*, came before the Court for an order to be heard without a jury, the order was made, reserving a right, under this rule to have a jury called for the trial of any issue of fact which might render it necessary. See case *ante*, pp. 371, 373.

(a) See *Garling v. Royds*, 21 S. J. 88; *Warner v. Murdock*, 4 Ch. D. 750; 46 L. J. Ch. D. 121; 35 L. T. N. S. 748; 25 W. R. 207.

(b) *Ante*, p. 363.

(c) *Anon.*, 21 S. J. 238; see also *Burrell v. Cartwright*, *ibid.*

28. Trials with assessors shall take place in such manner and upon such terms as the Court or a Judge shall direct.

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29. In any cause the Court or a Judge of the division to which the cause is assigned may, at any time or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any commissioner or commissioners appointed in pursuance of the 29th section of the said Act, or at the sittings to be held in Middlesex or London, and such question or issue shall be tried and determined accordingly.

[RULE XXVIII.]

Trials with assessors.

[RULE XXIX.]

Court or Judge may at any time order trials by commissioners.

The Master of the Rolls had directed that the issues of fact in the case before him should be tried before Judge and jury at the Chelmsford Assizes, and the action was accordingly entered for trial. When the case came on for trial, Huddleston, B., after consultation with the Chief Justice, refused to try it, as coming from the Chancery Division. Application was then made to the Master of the Rolls, who said he was powerless in the matter, though still of opinion that his order was right, and recommended application to the Court of Appeal. Plaintiff therefore moved before the Court of Appeal for leave to serve notice of appeal from the order of Huddleston, B., so as to get the case restored to the list. The Court held that there was no order from which appeal could be made (a). On this rule also see cases cited, *supra* (b).

By the rules of the Supreme Court, June, 1876, the three following rules have been here introduced:—

29A. The business to be referred to the Official Referees appointed under the Supreme Court of Judicature Act, 1873, shall be distributed among such Official Referees in rotation by the clerks to the Registrars of the Supreme Court, Chancery Division, in like manner in all respects as the business referred to conveyancing counsel appointed under the Act of the 15th and 16th Vict., c. 80, s. 41, is directed to be distributed by the second of the Consolidated General Orders of the Court of Chancery.

[RULE XXIXA.]

June, 1876.

Business to be distributed among official referees in rotation.

See cases on r. 29. The official referees hold their sittings at No. 32, Abingdon Street, Westminster; see notice W. N. 28th April, 1877.

29B. When an Order shall have been made referring any business to the Official Referee in rotation, such Order, or a duplicate of it, shall be produced to the Registrar's Clerk,

[RULE XXIXB.]

Order to be indorsed with name of official referee in rotation.

(a) *Cave v. Mackenzie*, W. N. 1876, 237, 256; 20 S. J. 744; but see *Clarke v. Cookson*, 2 Ch. D. 746; 45 L. J. Ch. D. 752; 34 L. T. N. S. 646; 24 W. R. 535; *Redmayne v. Vaughan*, 24 W. R. 983; 20 S. J. 744; *Warner v. Murdock*, 4 Ch. D. 750; 46 L. J. Ch. D. 121; 35 L. T. N. S. 748; 25 W. R. 207.
(b) *Ante*, p. 376, note (d).

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[RULE
XXIXB.]

whose duty it is to make such distribution as aforesaid ; and such clerk shall (except in the case provided for by Rule 29c of this Order), endorse thereon a note specifying the name of the Official Referee in rotation to whom such business is to be referred ; and the order so indorsed shall be a sufficient authority for the Official Referee to proceed with the business so referred.

[RULE
XXIXC.]

Saving power
of Court or
Judge at
Chambers to
direct or trans-
fer reference to
a particular
referee.

29C. The two last preceding rules of this Order are not to interfere with the power of the Court, or of the Judge at Chambers, to direct or transfer a reference to any one in particular of the said Official Referees, where it appears to the Court or the Judge to be expedient ; but every such reference or transfer shall be recorded in the manner mentioned in Rule 2 of the second of the said Consolidated General Orders, and a note to that effect be endorsed on the Order of Reference or transfer ; and in case any such reference or transfer shall have been or shall be made to any one in particular of the said referees, then the clerk in making the distribution of the business according to such rotation as aforesaid shall have regard to any such reference or transfer.

And by the rules of the Supreme Court, December, 1876, the following further rule has been added, which by oversight has also been marked 29a, instead of 29d :—

[RULE
XXIXA.]
December,
1876.

In action in
Chancery divi-
sion order
directing trial
of action or
question at
issue before
commission of
assize, &c., to
state on face of
it the reasons
why it should
be so tried.

29A. Where in any action in the Chancery Division the action or any question at issue in the action is ordered to be tried before any Commissioner or Commissioners of Assize, or at the London or Middlesex sittings of any Division other than the Chancery Division, the order directing such trial shall state on its face the reason for which it is expedient that the action, question, or issue should be so tried and should not be tried in the Chancery Division.

With reference to this rule see also cases before cited (a), and especially *West v. White*, 4 Ch. D. 631 ; 46 L. J. Ch. D. 333 ; 36 L. T. N. S. 95 ; 25 W. R. 342 ; see also *Wood & Ivory v. Hamblet* (b).

[RULE XXX.]

When matter
referred to
referee, sittings
and adjourn-
ments.

30. Where any cause or matter, or any question in any cause or matter, is referred to a Referee, he may, subject to the order of the Court or a Judge, hold the trial at or adjourn it to any place which he may deem most convenient,

(a) *Ante*, pp. 363-364.(b) *Ante*, p. 364 ; W. N. 1877, 166.

and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a Judge, proceed with the trial *de die in diem*, in a similar manner as in actions tried by a jury.

RULES OF
COURT.

Ord. 36.

[RULE XXX.]

As to fees of referees, see Order of February 1st, 1876, and April 24th, 1877, *post*. The sections of the Act referring to referees are ss. 56—59 inclusive.

Reference to a Master of a cause pending on the 1st November, 1875, with directions that the proceedings were to be carried on under the Judicature Acts, was held nevertheless to be a reference under the Common Law Procedure Acts for decision, not for report (*a*). It has been held that the last clause in this rule is directory and not imperative, and the breach of it is not sufficient ground to set aside an award; but might be held sufficient misconduct in the referee to induce the Judge at Chambers, if applied to at the time, to remove him from the reference (*b*). In *Carlile v. Bush* (*c*) the question of the power of the Court under the Judicature Act, to refer an action generally, came before Vice-Chancellor Hall, when he expressed his view that the whole action could be referred in all cases, except in those where a right was given to either party to insist upon a jury, and that right had been exercised. If there were no such power, the terms of O. XXXVI., rr. 2 and 30, were apparently not satisfied.

31. Subject to any order to be made by the Court or Judge ordering the same, evidence shall be taken at any trial before a Referee, and the attendance of witnesses may be enforced by subpoena, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials before a Judge of the High Court, but not so as to make the tribunal of the Referee a public court of justice.

[RULE XXXI.]

Subject to order, evidence to be taken before referee, subpoena for witnesses and trials to take place as before Judge.

See, with reference to this rule, case above cited (*a*).

32. Subject to any such order as last aforesaid, the Referee shall have the same authority in the conduct of any reference or trial as a Judge of the High Court when presiding at any trial before him.

[RULE
XXXII.]

Referee to have same authority as Judge trying cause.

On this rule also see case above cited (*a*). An order as to production of documents cannot properly be made by a referee (*d*).

(*a*) *Cruickshank v. The Floating Swimming Baths Co.*, 1 C. P. D. 260; 45 L. J. C. P. D. 684; 34 L. T. N. S. 733; 24 W. R. 644.

(*b*) *Robinson v. Robinson*, W. N. 1876, 154; 35 L. T. N. S. 337; 24 W. R. 675.

(*c*) *Ante*, p. 363; 21 S. J. 650.

(*d*) *Re Leigh, Rowcliffe v. Leigh*, 4 Ch. D. 661; 46 L. J. Ch. D. 60; 25 W. R. 56.

RULES OF
COURT.

Ord. 36.

[RULE
XXXIII.]Referee not to
commit, &c.[RULE
XXXIV.]Referee may,
pending trial
or in his re-
port, submit
any question to
Court, or sub-
mit facts with
power to draw
inferences, &c.

33. Nothing in these Rules contained shall authorise any Referee to commit any person to prison or to enforce any order by attachment or otherwise.

On this rule also see case (a).

34. The Referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the Referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other Referee.

This rule will give great convenience in many respects to trials by reference, but may cause a great increase in the expense of trials, by making, in fact, one trial into many.

But the Court cannot require explanation from the referee on oath as a witness (b); see on this rule also case before cited (a) and (c). A motion to set aside a report of an official referee must be supported by affidavit (d).

Ord. 37.

ORDER XXXVII.

EVIDENCE GENERALLY.

[RULE I.]

Witnesses
generally to be
examined vivâ
voce in open
court. Court
or Judge may
order any point
to be proved by
affidavit, or
that witness
may be ex-
amined on in-
terrogatories or
before commis-
sioner.

1. In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined vivâ voce and in open court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by in-

(a) *Cruickshank v. The Floating Swimming Baths Co.*, 1 C. P. D. 260; 45 L. J. C. P. D. 684; 34 L. T. N. S. 733; 24 W. R. 644.

(b) *Broder v. Saillard*, W. N. 1876, 116; 45 J. L. Ch. D. 414; 24 W. R. 456.

(c) *Re Leigh, Rowcliffe v. Leigh*, 4 Ch. D. 661; 46 L. J. Ch. D. 60; 25 W. R. 56.

(d) *Stubbs v. Boyle*, 2 Q. B. D. 124; 46 L. J. Q. B. D. 136; 35 L. T. N. S. 906; 25 W. R. 184.

terrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or Judge that the other party bonâ fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

RULES OF
COURT.

Ord. 37.

[RULE I.]

An application that evidence might be taken by affidavit, with liberty to cross-examine in Court, on the ground that though the affidavits were not sworn till after the rule as to continuing suits in that condition was promulgated, the greater part of the expense had been incurred before; was refused, the rule being imperative, unless by consent of parties that the evidence should be taken vivâ voce (a). The costs however on this application were reserved, and the defendants who opposed were subsequently ordered to pay them (b). An application was made that, in a case for proving a will in solemn form, the execution and attestation might be proved by affidavit, the estate being small, and none of the parties cited having appeared. The President held that the rule would not justify the order asked for, affidavits being thereby applicable only to the proof of isolated facts (c). It seems that facts, which are merely evidence if introduced into pleadings, may be struck out (d); but in the case cited, the facts were not merely evidence only, but were also scandalous. In *Gardiner v. Hardy* (e), which was a foreclosure suit commenced before the 2nd of November, 1875, against two defendants, both in New Zealand, an application was made for leave to prove service, and the facts alleged in the bill by affidavit. Vice-Chancellor Bacon, however, said he could not order the evidence to be so taken. In *Bell v. Hazlerigg* (f), defendant moved that he might be allowed to file affidavit of a witness relating to facts stated in the defence, on the ground that the witness was unable through illness to attend. Fry, J., appointed on this application a special examiner to take the deposition, on terms that it should not be used at the trial, unless evidence should be given of witness's inability to attend. It seems the High Court of Justice, see words "in open Court," has no power to hear cases in private, even by consent of parties, except where wards of Court or lunatics are concerned, or in those cases where practice of Ecclesiastical Courts, as to hearing in camerâ, is continued (g). In *Outram v. Outram* (h), it was decided that witnesses, though parties to the suit, may be ordered out of Court pending evidence by other witnesses. The question as to what is to be the practice relative to the hearing of counsel in causes heard on vivâ voce evidence in Chancery, was discussed in a case before Hall, V.-C. (i), who expressed his opinion, after conference with a Judge of the Court of Appeal, that the course ought to be as follows: 1. The plaintiff's leading counsel is to open the case and

When evidence not allowed to be taken by affidavit.

Power to hear cases in private, when.

Practice in Chancery Division as to hearing counsel.

(a) *Pattison v. Wooler*, 1 Ch. D. 464; 2 Ch. D. 586; 45 L. J. Ch. D. 274; 34 L. T. N. S. 415; 24 W. R. 455; sub nom. *Patterson v. Wooler*.

(b) 24 W. R. 455; 20 S. J. 409.

(c) *Cooke v. Tomlinson*, 24 W. R. 851; 20 S. J. 684.

(d) *Blake v. The Albion Life Assurance Co.*, 45 L. J. C. P. D. 663; 35 L. T. N. S. 269; 24 W. R. 677.

(e) *Ante*, p. 215; W. N. 1876, 153.

(f) 21 S. J. 610.

(g) *Nagle Gillman v. Christopher*, 4 Ch. D. 173; 46 L. J. Ch. D. 60.

(h) W. N. 1877, 75; see also *Re Western of Canada Oil Lands and Works Co.*, W. N. 1877, 151; 46 L. J. Ch. D. 683; 25 W. R. 787; see *Carr v. Taylor*, 21 S. J. 669.

(i) *Anon.*, 21 S. J. 458.

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COURT.**Ord. 37.**

[RULE I]

call his witnesses. 2. The defendant's leading counsel is to open his case and call his witnesses. The whole of the facts being before the Court, 3. The plaintiff's junior to be heard (but it was not clearly expressed, whether on evidence or generally). 4. The defendant's junior counsel to be heard. 5. The plaintiff's leading counsel to reply generally on the whole case. There was then some discussion on the matter, and it was suggested that after the evidence had been heard two counsel on each side ought to be heard on any point of law; but in the case before the Court, the law, if any, was so inextricably involved with the facts that the junior was heard to cite authorities after the plaintiff's senior had replied before judgment.

[RULE II.]

On motion, petition, or summons, evidence by affidavit, but Court or Judge may order attendance of witness for cross-examination.

2. Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

Under s. 40, 15 & 16 Vict. c. 86, and Order 5th, February, 1861, there was a power to cross-examine in Chancery on affidavits filed in interlocutory applications, but this cross-examination was before the examiner (a), or after decree on affidavit used in Chambers before the Chief Clerk (b), and, so far as we know, there was no cross-examination on any affidavit on an interlocutory application in any of the Common Law Courts.

Cross-examination may under this rule still be ordered to be taken elsewhere than in Court (c).

In re The South Wales and Atlantic Steam Ship Co., Vice-Chancellor Hall directed the cross-examination of witnesses who had made affidavits on petition, to be taken before the examiner (d). On an application under this rule, and r. 4, *post*, to cross-examine defendant's garnishees in an issue, directed between judgment creditor and judgment debtor and garnishee, it was held that the rule was made to meet the case of an ordinary witness (not a party to a cause), against whom there would be no other power (e). Cross-examination on motion, &c., is not a matter of course, but an order may be made that deponent attend to be cross-examined, if the Court thinks fit (f). After a summons is taken out, a time will, on the application of either party, be fixed for closing the evidence. If this be not done and the case comes on, then after the summons is opened, no further evidence will be allowed to be put in. An affidavit filed, after summons had been opened before the Chief Clerk, was disallowed as evidence at an adjourned hearing in Court (g).

[RULE III.]

Affidavits confined to matters within knowledge of deponent, &c.

3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of

(a) Order 5th Feb., rr. 7, 15.

(b) 15 & 16 Vict. c. 80, s. 30.

(c) *Re Civil Service Co-operative Society*, 21 S. J. 127.

(d) 20 S. J. 232.

(e) *Storer v. Simmons*, W. N. 1876, 40; 20 S. J. 260.

(f) *Skete v. Bishop Stortford Local Board*, 20 S. J. 663.

(g) *Anon.*, 20 S. J. 684.

hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

RULES OF
COURT.

Ord. 37.

[RULE III.]

Upon this rule see Rules of Supreme Court (Costs), O. VI., special allowances and general provisions, 18-20.

By Order 40, of Consolidated Orders in Chancery, Rule 9. Where upon the hearing of any cause, petition, or motion, the Court is of opinion that any pleading, petition, or *affidavit*, or any part thereof, is improper or of unnecessary length, there, unless the same has been referred for impertinence under the practice existing before the passing of statute 15 & 16 Vict. c. 86, the Court may either declare such pleading, petition, or affidavit, or any part thereof, to be improper or of unnecessary length, or may direct the taxing master to look into such pleading, petition, or affidavit, and distinguish what part thereof is improper or of unnecessary length, and may direct the taxing-master to ascertain the costs occasioned to any party by such part thereof as in the one case may have been declared to be, and in the other case may have been distinguished as being improper or of unnecessary length, and may make such order as is just for the payment, set-off, or other allowance of such costs.

Consolidated
Orders, Order
40, Rule 9.

Under the common order to tax, the taxing-masters were not in the habit of thus distinguishing unless directed to do so (*a*), though it seems that before the passing of this order they were accustomed to do so of their own accord (*b*). For form of the direction see (*c*). It would seem that the direction to the taxing-master itself operates as a declaration that the affidavit, &c., is of an unnecessary length (*d*).

Practice of
taxing-masters
as to this.

This rule is amended, and the taxing-master will now without special direction act as he would under the former rules, in case of a special direction. See Rules of Supreme Court (Costs), O. VI., r. 18, *post*.

Affidavits merely echoing statement of claim in cases where persons making application had no personal knowledge of the matters deposed to, cannot be used at the hearing, and the costs of them will be disallowed (*e*).

4. The Court or a Judge may, in cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

[RULE IV.]

Court or Judge
may order ex-
amination
before any
officer of Court,
and such ex-
amination to
be given in
evidence.

In a case before the Master of the Rolls an order was made for a witness to be examined before the examiner on behalf of the respondent

(a) *Re Farington*, 33 Beav. 346.

(b) *Moore v. Smith*, 14 Beav. 396.

(c) *Seton*, 4 Edit. p. 125; *Burchell v. Giles*, 11 Beav. 34; *Woods v. Woods*, 5 Ha. 229; *re Bedminster Charities*, 12 Jur. 665; *Hanslip v. Kitton*, 8 Jur. N. S. 835.

(d) *Re Skidmore*, 1 Jur. N. S. 696.

(e) *Per M. R.*, W. N. 1876, 59.

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COURT.**Ord. 37.**

[RULE IV.]

to a summons under the Vendors and Purchasers Act, 1874 (a). Defendant had obtained an order to examine an old and infirm witness, *de bene esse*, plaintiff to be at liberty to attend the examination and to cross-examine. The examination was taken in presence of the plaintiff's adviser, who cross-examined the witness; the examiner returned the deposition not in his own handwriting (as directed by 15 & 16 Vict. c. 86 s. 32), certifying them to be taken by him, "read over to the witness and signed by her in the presence of me," the Vice-Chancellor said that in consideration that the other parties were present, and that the course was adopted without objection, the certificate stating what it did, he should order the depositions to be filed (b).

Ord. 38.

ORDER XXXVIII.

EVIDENCE BY AFFIDAVIT.

[RULE I.]

Within fourteen days from consent to take evidence by affidavit, or within time agreed plaintiff to file affidavits and deliver list to defendant or his solicitor.

1. Within fourteen days after a consent for taking evidence by affidavit as between the plaintiff and the defendant has been given, or within such time as the parties may agree upon, or a Judge in Chambers may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

It has been held that counsel should not certify a cause as short, unless the evidence is by affidavit (c). A consent under this rule must be in writing (d).

Comparing this rule with O. XVI., r. 8, and O. XXXVII., r. 1, it was held that infants defending by guardian *ad litem*, are bound by the guardian's consent in this rule without any order of the Court for such consent (e). See also on this rule, *Pattison v. Wooler* (f).

[RULE II.]

Time within which defendant shall file his affidavits and deliver list.

2. The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a Judge in Chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

[RULE III.]

Time within which plaintiff to file affidavits in reply, and deliver list.

3. Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

(a) *Re Springall and Goldsack's contract*, W. N. 1875, 225 ; 20 S. J. 92.

(b) *Bolton v. Bolton*, 2 Ch. D. 217 ; 34 L. T. N. S. 123 ; 24 W. R. 426.

(c) *Anon.*, W. N. 1875, 193.

(d) *New Westminster Brewery Co. v. Hannah*, 1 Ch. D. 278 ; 20 W. R. 157 ; 20 S. J. 132.

(e) *Fryer v. Wiseman*, W. N. 1876, 3 ; 45 L. J. Ch. D. 199 ; 33 L. T. N. S. 779 ; 24 W. R. 205 ; see also *Knatchbull v. Fowle*, 1 Ch. D. 604 ; 24 W. R. 629.

(f) *Ante*, p. 381 ; 2 Ch. D. 586 ; 1 Ch. D. 464 ; 45 L. J. Ch. D. 274 ; 34 L. T. N. S. 415 ; 24 W. R. 455 ; sub nom. *Patterson v. Wooler*.

These rules are modelled on the Consolidated Orders, Order 33, Rules 5, 6, 7, and are nearly in the same words, save that in the Chancery Rules the time was expressly limited without the alternatives given in the new rules, and the process under motion for decree required no consent formerly to try on affidavits. The 7th rule above mentioned went on to make formal regulation as to matter inserted in an affidavit not strictly in reply to the defendant's affidavits, which is omitted in form in the new rule, but may nevertheless be substantially acted on by the Court without an express rule to that effect.

RULES OF
COURT.

Ord. 38.

[RULE III.]

Consolidated
Orders, Order
33, Rules 5, 6, 7.

4. When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a Judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

[RULE IV.]

Party desiring
to cross ex-
amine on affi-
davit to serve
party who has
filed it with
notice to pro-
duce deponent
at trial, &c.

The foundation of this rule seems to have been the Order in Chancery of February 5th, 1861, Rule 19, which is substantially directed to the same effect, as nearly as the difference in the former practice from the new would allow. The last clause, however, in that Order, as to the expense, in the first instance, of producing the witness for cross-examination, which the party producing the witness was allowed to call for from the party requiring his production, has been found productive of difficulties, and has been altered by this new rule.

Compare Order
of Feb. 5th,
1861, Rule 19.

With reference to this rule, see the case before cited of *Bolton v. Bolton* (a). It has been held to be an irregular course to apply that evidence on which the witnesses have not submitted to cross-examination upon being ordered so to do, should be taken off the file (b).

5. The party to whom such notice as is mentioned in the last preceding Rule is given, shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined.

[RULE V.]

Party noticed
entitled to
compel attend-
ance of depo-
nent.

This corresponds to Chancery Orders, 5th February, 1861, Rule 20. The attendance of the witnesses was hitherto compelled in such cases in

Order Feb. 5th,
1861, Rule 20.

(a) *Ante*, p. 384; 2 Ch. D. 217; 34 L. T. N. S. 123; 24 W. R. 426.

(b) *Meyrick v. James*, W. N. 1877, 120; 46 L. J. Ch. D. 579.

RULES OF COURT.

Ord. 38.

[RULE V.]

Attendance of witnesses, how compelled.

Chancery by *subpœnas ad testificandum* or *subpœnas duces tecum* sued out at the Record and Writ Clerk's Office, but now that all the Courts are made only divisions of one great Court, it might be supposed that all writs should issue from one office, no matter in what division they were to be used; such, however, does not appear to be the effect of the Act, see *post*, O. LX. The writs, it would seem, needful in the divisions of the Court other than the Chancery Division, will be issuable as before the Act, for the Court represented by the division in which the action stands. With regard to these a difficulty may arise requiring some further provision by rule from the abolition of terms; for formerly a writ of subpoena must have been tested in term time or it was void (a).

[RULE VI.]

Evidence by affidavit to be printed; notice of trial at same time after close of evidence as provided after close of pleadings.

6. When the evidence in any action is under this Order taken by affidavit, such evidence shall be printed, and the notice of trial shall be given at the same time or times after the close of the evidence as in other cases is by these Rules provided after the close of the pleadings.

This rule is referred to in order, August 12th, 1875, O. III., which see.

Provision as to notice of trial to be given after close of evidence does not apply where evidence is taken under a Judge's order (b). The Court will readily give order for evidence to be taken by affidavit, where it is for the interest of suitors (c).

Ord. 39.

ORDER XXXIX.
MOTION FOR NEW TRIAL.

[RULE I.]

Application for new trial in jury cases to the Divisional Court, when case tried before Judge without a jury to the Court of Appeal.

1. *The first rule of this order has been repealed, and the following two orders substituted therefor by the rules of the Supreme Court, December, 1876:—*

Order XXXIX, Rule 1, is hereby repealed, and instead thereof the following provision shall take effect:—

Rule 1. Where, in an action in the Queen's Bench, Common Pleas, or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. And where the trial has been by a Judge without a Jury, the application for a new trial shall be to the Court of Appeal.

See on this rule the case before cited of *Warner v. Murdock* (d), and *infra*, *Oastler v. Henderson* (e); *Hunt v. The City of London Real Property Company, Limited* (f).

(a) *Edgell v. Curling*, 7 M. & G. 958.

(b) *Waring v. Lacey*, 24 W. R. 318; 20 S. J. 311.

(c) *Per Hall, V.-C., Att.-Gen. v. Pagham Harbour Reclamation Co.*, W. N. 1876, 94; 20 S. J. 331.

(d) *Ante*, pp. 53, 361; 4 Ch. D. 750; 46 L. J. Ch. D. 121; 35 L. J. N. S. 748; 25 W. R. 207.

(e) 2 Q. B. D. 575; 46 L. J. (App.) Q. B. D. 607; 37 L. T. N. S. 22.

(f) 2 Q. B. D. 605.

RULES OF COURT.

Ord. 39.

[RULE IA.]

Application for new trial to call on other party to show cause at end of eight days from date of order why new trial should not be directed.

When to be made.

1A. Applications for new trials shall be by motion calling on the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the Court or a Judge shall enlarge the time:—

An application to a Divisional Court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial, or on the first subsequent day on which a Divisional Court to which the application may be made shall have actually sat to hear motions. If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within the first four days of the next following sittings.

The original rule was, and it seems the two new rules also, are in the main founded on R. G. H., 1853, Rule 50. The order is to show cause, see also **O. XL.**, r. 6, and **O. LVIIa.**

The enactment of these new rules above set out has rendered unnecessary the detailed statement of several cases decided upon the original rule; it may be well, however, to furnish a reference to such in case it may be required to refer to them, this is accordingly done (a).

Application for a new trial on the ground that the finding was against the weight of evidence, also under **O. XLIV.**, r. 4, of December, 1876, to enter judgment for plaintiff. The Court granted the order to show cause as to new trial, but held that the application to enter judgment was merely by notice of motion of application under **O. LVIII.**, rr. 2, 4 (b).

In *Oastler v. Henderson* (c) defendant had obtained in the Queen's Bench Division a rule nisi for a new trial on the ground of surprise, which was discharged on the ground that the Court had no right to make the order, the trial having been before a Judge without a jury. It was held that no matter what the cause of the application for a new trial in such case, it must be to the Court of Appeal not to a Division of High Court. In *Shaw v. Hope* (d) it was held that the time for an application for a new trial on the ground of misdirection under **O. XXXIX.**, r. 1a, begins to run from the time the jury is discharged.

2. A copy of such order shall be served on the opposite party within four days from the time of the same being made.

[RULE II.]

Copy of order to be served within four days from its being made.

It is submitted if this rule be broken, the party having obtained the

(a) *Anon.*, 20 S. J. 292; *Richardson v. Richardson and Frost*, 20 S. J. 391; *Sugden v. Lord St. Leonards*, 1 P. D. 154; 46 L. J. P. D. A. 49; 34 L. T. N. S. 369; 24 W. R. 479; see **O. 58**, rr. 2, 14; *Stribley v. Parents' Insurance Co.*, 20 S. J. 132; *Hallums v. Hills*, 46 L. J. (App.) Q. B. D. 88; 24 W. R. 956; W. N. 1876, 237; *Allgood v. Gibson*, 20 S. J. 802; see also **O. 54**, r. 6; *Crom v. Samuels*, 2 C. P. D. 21; 46 L. J. C. P. D. 1; 35 L. T. N. S. 423; 25 W. R. 45; *Robinson v. Bannister*, W. N. 1876, 250.

(b) *Poster v. Roberts*, W. N. 1877, 11.

(c) W. N. 1877, 137.

(d) 25 W. R. 729.

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[RULE III.]

New trial not
to be granted
on misdirection
or improper
admission or
rejection of
evidence, &c.

Material alte-
ration of law.

Old rule where
evidence impro-
perly rejected.

Same rule as
to acceptance
of improper
evidence.

Hitherto no
limit to inquiry
in second trial,
the rule was
general.

verdict will be entitled to hold it (a), at least until set aside by some other means on evidence of merits.

3. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.

This rule materially alters the law on this head. It has been laid down under the law hitherto existing, that where evidence has been improperly rejected, the Court would grant a new trial in every case unless a verdict given in favour of the party offering the rejected evidence, supposing that evidence to have been before the jury, would clearly have been set aside as against the weight of evidence (b). "In some cases," observed Parke, B., in delivering the judgment in the case just cited, "no doubt the Court may refuse a new trial when the witness has been improperly rejected, as where the fact which such evidence was to establish was proved by another witness and not disputed (c), or where, assuming the rejected evidence to have been received, a verdict in favour of the party for whom it was offered, would have been clearly and manifestly against the weight of evidence, and *certainly* set aside upon application to the Court as an improper verdict. We cannot say, however strong our opinion may be on the propriety of the present verdict, that if the lease had been received, it would have had no effect with the jury; nor that it is clear beyond all doubt if the verdict had been for the defendant, that it would have been set aside as improper, and therefore there must be a new trial" (d). So it has been held as to the acceptance of improper evidence. Where some parts of the evidence received are inadmissible, and others admissible, the Court has not the means of referring the verdict to those parts only which were properly admitted (e), and therefore unless it were clear beyond a doubt that such evidence did not weigh with the jury in forming their opinion, or that the verdict if given for the opposite party, must have been set aside as against evidence, a new trial would have been granted (f). So, as to misdirection, as the jury are bound to take their law from the Court, the presumption is that they have done so, and unless it be *quite clear* that the result must have been the same if the proper questions had been put or the law rightly stated, a new trial was granted for misdirection, though the Court might think the verdict was quite correct.

Before the Judicature Acts where a new trial was granted on a motion instead of a venire de novo on a bill of exceptions, *e.g.*, on the ground of

(a) See *Doe d. Whitty v. Carr*, 16 Q. B. 117.

(b) *Crease v. Barrett*, 1 C. M. & R. 919.

(c) *Edwards v. Evans*, 3 East, 451.

(d) 1 C. M. & R. 933.

(e) *Rex v. Sutton*, 4 M. & S. 544.

(f) *Baron de Rutzen v. Farr*, 4 Ad. & E. 53; *Doe v. Wright*, 6 N. & M. 132, 7 Ad. & E. 313; see *Henman v. Lester*, 12 C. B. N. S. 789; 31 L. J. C. P. 370.

the rejection of proper, or the reception of improper evidence, or of misdirection, which are the grounds dealt with by this order, the Court would not limit the inquiry on a second trial, but the rule for a new trial was general (*a*). There were, however, grounds for a new trial in which the Court could limit the question to be tried (*b*), but except where the limitation was express, the trial was unlimited, and was open on the whole record.

This rule passed to remedy a defect in procedure applies to all rules nisi argued after the Judicature Rules came into operation though granted before (*c*).

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[RULE III.]

4. A new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question.

[RULE IV.]

New trial may be ordered on any question, &c.

5. An order to show cause shall be a stay of proceedings in the action, unless the Court shall order that it shall not be so as to the whole or any part of the action.

[RULE V.]

Order to show cause shall stay proceedings.

It is submitted that this will be held to operate as a stay on the other party only after service of the order, or at least only conditionally on due service of it within the four days, but this is no more than a bare suggestion.

ORDER XL.

Ord. 40.

MOTION FOR JUDGMENT.

1. Except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

[RULE I.]

Judgment to be obtained on motion for judgment.

This entirely alters the mode of obtaining judgment. It is now almost in every case to be the result of a motion in Court to which the other proceedings have only led up, and for which they shall have established grounds. See also **O. XXIX.**, r. 10.

Motions for judgment in actions shall not be brought on as ordinary motions, but shall be set down in the cause book. They can be marked short on production of the usual certificate of counsel, and will then be placed in the paper on the first short cause day after the day for which notice is given. If not marked short, they will come into the general paper in their regular turn. It will be advisable that the notices of motion for judgment should, if it is intended to mark them short, contain a

(*a*) *Bernasconi v. Farebrother*, 3 B. & Ad. 372; *Mahony v. Fraser*, 1 D. P. C. 703; *Lord Macclesfield v. Bradley*, 7 M. & W. 570.

(*b*) See Gibbs, J., in *Hutchinson v. Piper*, 4 Taun. 555; *Bower v. Hill*, 5 D. P. C. 183; *Thwaites v. Sainsbury*, 7 Bing. 437.

(*c*) *Earp v. Faulkner*, W. N. 1876, 181; 34 L. T. N. S. 284; 24 W. R. 774; see also on this Rule *Marsh v. Isaacs*, 45 L. J. C. P. D. 505.

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[RULE I.]
—

statement to that effect, and also a statement that no further notice will be given of their having been so marked. Such statement will dispense with the necessity for giving the defendants further notice that motions for judgment have been marked short. Where a defendant makes his defence, and the plaintiff moves under O. XL., r. 11, for such order as he is entitled to on the admissions of the defendants, the action need not be set down; but if, on the motion being made, it appears that there must be discussion or argument, it may be ordered to go into the general paper, subject to any order for its being advanced. The attention of solicitors is also called to the provisions in the Judicature Rules as to notices of trial; as notice of trial can only be given after pleadings closed, the proper course, where there are no pleadings, is to set the action down on motion for judgment under O. XL., r. 1 (a). When a party entitled to move under this Order, as also for an order nisi for new trial, formerly, the party to show cause on the last mentioned order would have had the right to begin, now the party moving for judgment, as both motions are heard together (b). In motions for judgment which are set down to be heard as short causes where there is no statement of claim, Vice-Chancellor Malins has ordered that the writ and notice of motion for judgment shall be left with the officer of the Court in the same way that papers in ordinary short causes are left (c).

[RULE II.]
—

Where order that judgment be entered subject to leave to move, party having leave shall set down action on motion for judgment, and give notice of motion within time limited, or within ten days after trial.

2. Where at the trial of an action the Judge or a Referee has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the Judge in reserving leave, or if no time has been limited, within ten days after the trial. The notice of motion shall state the grounds of the motion, and the relief sought, and that the motion is pursuant to leave reserved.

In the Common Pleas Division, orders under rr. 4, 5, and 6, where motion is *ex parte* to show cause, are to be made on ordinary motion days; in other cases under rr. 2, 3, where leave reserved, or Judge has abstained from ordering judgment to be entered, *i.e.*, where notice given before motion, the case is to be put in new trial paper (d). A similar order was made in the Queen's Bench, adding "where parties have moved for a new trial, and also to enter judgment, the orders are to come on for argument together" (e). In the *Earl of Shrewsbury v. Garrold* (f), the plaintiffs were moving for judgment under this rule, when the preliminary objection was taken that their notice did not state the grounds of their motion. The Court held the objection good, but enlarged the time for moving, and gave the plaintiff leave to serve fresh notice on payment of the costs of the day.

(a) *Court Paper*, W. N. 1875, 153; 20 S. J. 481.

(b) *Scarth v. The Steam Navigation Co.*, 20 S. J. 332; sub nom. *Scarf v. &c.*, W. N. 1876, 83; *Bussard v. Spiers*, 20 S. J. 332.

(c) *Oliver v. Wright*, W. N. 1877, 80.

(d) 20 S. J. 73.

(e) W. N. 1875, 216.

(f) 21 S. J. 458.

3. Where at the trial of an action the Judge or Referee abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

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[RULE III.]

Where no direction for entry of judgment, plaintiff to set down action on motion, &c.

This rule may in cases where there are many parties, and where the verdict is unfavourable to the plaintiff, cause costs by leaving it open to all the defendants to give notice and move simultaneously, and if they do there seems no means of fixing all but one with costs for doing what the rule expressly allows them to do. Even if served with notice of motion for judgment by another defendant, there is nothing to prevent a second defendant serving another notice of motion under this rule, in which it appears the rule has made an omission.

A case referred at trial before the Act, and award after the passing of the Act, appears to fall within the first branch of s. 22 as "fully heard," so far as the Court is concerned (a). On this rule see orders above noted on r. 2.

4. *This rule has been repealed by the rules of the Supreme Court, December, 1876, and a new rule substituted therefor as follows:—*

[RULE IV.]

Where, at or after trial of action by jury, the Judge has directed entry of judgment, any party may, without leave, apply to set aside such judgment, &c.

Order XL., Rules 4 and 6 are repealed, and Rule 5 is repealed so far as it affects trials before a Judge; and the following Rule shall be substituted for Rule 4:—

4A. Where, at or after the trial of an action by a Jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the Jury upon the question or questions submitted to them.

Where, at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong.

Or where trial before Judge on ground that upon finding as entered judgment is wrong.

An application under this Rule shall be to the Court of Appeal.

See Appellate Jurisdiction Act, 1876, s. 17.

(a) *Lloyd v. Lewis*, 2 Ex. D. 7; 46 L. J. (App.) Q. B. D. 81; 35 L. T. N. S. 539; 25 W. R. 102; see also *Cruickshank v. The Floating Swimming Baths Co.*, 1 C. P. D. 260; 45 L. J. C. P. D. 684; 34 L. T. N. S. 733; 24 W. R. 644.

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[RULE IVa.]
—

In the original rule, and also, it seems, in that substituted for it, a slip similar to that above noted on the last foregoing rule seems to have been made, though here it was no doubt more difficult to guard against, for though a judgment once pronounced by the Court must bind permanently and at once every party to a suit, it does not follow that a refusal at the instance of one party to set aside a judgment entered is necessarily a refusal to set the same judgment aside at the instance of another and on a different ground. Some rule might, however, have been made that a second defendant moving on the same grounds which had already been urged by another for setting aside a judgment, should be charged with the costs of his motion, for, as the rule stands, it expressly gives leave to any defendant to move for this purpose.

In *Jones v. Davis* (a), a verdict having been returned for the plaintiff for £5, the Judge directed judgment to be entered for the defendant. Plaintiff moved, *ex parte*, to enter judgment for him under this new rule. The Court held that his proper course was by notice of motion of appeal, and not by motion in Court for order nisi.

With reference further to the new rule, see *Foster v. Roberts* before cited (b). See also on this rule orders before noted under r. 2, as also *Witt v. Parker* (c).

[RULE V.]
—

Or on ground
that upon find-
ing as entered
judgment is
wrong.

5. Where at the trial of an action the Judge or a Referee has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong.

This rule has been repealed, so far as affects trial before a Judge, by the rules of December, 1876 :—

See new rule, *ante*, p. 391.

It has been held on motion to set aside or vary judgment in a case tried before Official Referee under ss. 58 and 59 of the Act of 1873, that an affidavit or some evidence of what took place at the trial must be furnished to the Court (d).

Similar remarks to the earlier on the last foregoing Rule are open on this. It seems this is meant to differ from the last in this respect that the motion in r. 4 is to be on the ground of a wrong entry of the finding, in this on the ground of a wrong judgment upon the finding as entered.

[RULE VI.]
—

6. *This rule has been repealed by the rules of the Supreme Court, December, 1876 :—*

See new rule, *ante*, p. 391. See on this rule also *Stubbs v. Boyle* (d).

Before the repeal of this rule the following case was decided on it. Verdict had been found for the plaintiff, and judgment had been entered for him with costs. An application made to the Divisional Court to set aside the judgment was refused, as the motion was not made within four days. The order was reversed on appeal; the merits allowed to be canvassed (e).

(a) W. N. 1877, 86; 36 L. T. N. S. 415.

(b) *Ante*, p. 387; W. N. 1877, 11.

(c) *Ante*, pp. 17, 155–156; W. N. 1877, 118; 46 L. J. (App.) Q. B. D. 450; 36 L. T. N. S. 538; 25 W. R. 518.

(d) *Stubbs v. Boyle*, 2 Q. B. D. 124; sub nom. *Stubble v. Boyle*, 46 L. J. (App.) Q. B. D. 136; 35 L. T. N. S. 906; 25 W. R. 184.

(e) *Allgood v. Gibson*, 25 W. R. 60; 20 S. J. 802.

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[RULE VII.]

7. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within ten days after his right so to do has arisen, then after the expiration of such ten days any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

Where issues have been ordered to be tried or otherwise determined, plaintiff may set down action on motion for judgment as soon as issues determined, &c.

This rule appears to include r. 3, except that it may be held to apply to cases only in which there has been a special order directing a trial of fact, while r. 3 refers to cases where the trial comes on in the ordinary course.

8. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact.

[RULE VIII.]

Party considering that determination of some only of the issues renders further determination needless, &c.

This rule does not apply where there is no issue of fact, but only a question of construction ordered to be tried; or, if an issue of fact have been found, where it is not ordered to be finally determined (a). See also O. XXXIV., r. 2.

9. No action shall, except by leave of the Court or a Judge, be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.

[RULE IX]

No action shall be set down on motion for judgment after one year, &c.

10. Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or

[RULE X.]

On motion for judgment or for new trial, Court, if satis-

(a) *Republic of Bolivia v. The Bolivian Navigation Co.*, W.N. 1876, 77; 24 W. R. 361.

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COURT.

Ord. 40.

[RULE X.]

fied that it has materials before it for final judgment, may give final judgment, &c.

any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit.

In an action for libel, the subject of the action was a report, in a pamphlet published by the defendants, of the trial, and conviction of one G., for conspiracy with the plaintiff and others, to obtain by fraudulent misrepresentations, salvage money to a greater extent than had been really paid from the owners of goods on board a certain ship, and ultimately to defraud the underwriters. At the trial, Coleridge, C. J., held, that the privilege of private persons differed from the privilege of a publisher of a newspaper in the report of a trial; that, as a matter of law, such a report as the pamphlet, which was only of part of the proceedings of the trial, could not be privileged. Judgment was entered for the plaintiff. The Common Pleas Division afterwards made absolute a rule for a new trial, on the ground that the verdict was against the weight of evidence, but refused to enter judgment for the defendants. Defendants on this appealed, and urged that there was no evidence upon which the jury could find that the pamphlet was not a "fair" report of the trial, and that the Court should therefore under this rule enter judgment for the defendants. The Court held—1. That the privilege of the publisher of a newspaper and of a private person, in publishing the report of a trial at law was the same. 2. That the report of a trial may be "fair," and therefore privileged, though containing only the speech of counsel and the summing up of the Judge. But 3. That whether the report was "fair" or not, was a question which the Court could not withdraw from the jury, and that this rule had made no difference on this point (a). See also the case before cited of *Rolfe v. McLaren* (b).

[RULE XI.]

Any party at any stage of action may apply for such order as, on admissions in pleadings, he is entitled to without waiting for determination of other questions.

11. Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. The foregoing Rules of this Order shall not apply to such applications, but any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

A partnership account was ordered on an *ex parte* application, on admissions in answer under this rule, and under O. XXXIII. (c). Also a

(a) *Milissich v. Lloyd's*, W. N. 1877, 36; 46 L. J. C. P. D. 404; 36 L. T. N. S. 423; 25 W. R. 353.

(b) 3 Ch. D. 106; 24 W. R. 816; *ante*, p. 264.

(c) *Turquand v. Wilson*, 1 Ch. D. 88; 45 L. J. Ch. 104; 24 W. R. 56.

full account in admission (a). Such an order may be made with reserve of further considerations, "not requiring further hearing of the cause" (b). See on this rule also the cases before cited, *Bridson v. Smith* (c), *Gillott v. Ker* (d); case cited *ante*, pp. 266—267 (e), *Brassington v. Cussons* (f), *Jenkins v. Davies* (g), *Hanmer v. Flight* (h), *Rolfe v. McLaren* (i) and *Aitken v. Dunbar*, *Litton v. Litton* (k), *Parsons v. Harris* (l). In an action for partition or sale of real estate under Partition Act. Plaintiffs claimed to be owners of one-eighth of the property, and stated that defendants were owners of three-sixteenths. Defendants admitted the facts alleged in the statement of claim. Plaintiff then sought for an order for inquiry, who were the parties interested, and in what shares, and whether such persons were all parties to the action, or had been served with notice of the order, and that further consideration should be adjourned. Before motion came on, persons entitled to five-eighths had obtained order giving leave to attend proceedings, and they opposed the motion. In *Gilbert v. Smith*, the Court of Appeal made an order under this rule, citing *Bennett v. Moore* (b), adjourning further hearing without requiring any further prior hearing, and giving leave to any party to apply to have further hearing taken in Chambers (m). A statement of claim set out a memorandum of deposit by way of equitable mortgage to secure £5,000 with interest. Defence alleged concurrent parol agreement, that the loan should be for a year certain, which had not expired when the action was commenced; that such agreement was of the essence of the contract, which the defendant had partly performed by the deposit. The reply alleged that there was no consideration for the alleged parol agreement; that such agreement, if made, was void, and save as aforesaid, joined issue on the defence. Plaintiff moved under this rule, on the ground that the defence was in fact demurrable, and consequently the plaintiff was not entitled to the relief claimed by his pleadings. Hall, V.-C., refused upon such a motion to try the validity of the agreement, and simply dismissed the motion with costs (n). On this rule, see Court Papers set out, *ante*, pp. 389—390.

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[RULE XI.]

ORDER XLI.

Ord. 41.

ENTRY OF JUDGMENT.

1. Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole

[RULE I.]

Judgment to be entered by proper officer in book, &c.

(a) *Rumsey v. Reade*, 1 Ch. D. 643; 45 L. J. Ch. D. 489; 33 L. T. N. S. 803; 24 W. R. 245.

(b) *Bennett v. Moore*, 1 Ch. D. 692; 45 L. J. Ch. 275; 24 W. R. 690.

(c) *Ante*, p. 300; W. N. 1876, 103; 24 W. R. 392.

(d) *Ante*, pp. 299, 301; W. N. 1876, 116; 24 W. R. 428.

(e) *Anon.*, 20 S. J. 468.

(f) *Ante*, p. 353; 24 W. R. 881; 20 S. J. 704.

(g) *Ante*, p. 264; 1 Ch. Div. 696; 24 W. R. 690.

(h) *Ante*, p. 221; W. N. 1876, 54; 35 L. T. N. S. 127; 24 W. R. 346; judgment reversed on appeal, 36 L. T. N. S. 279.

(i) *Ante*, p. 264; 3 Ch. D. 106; 24 W. R. 816.

(k) *Ante*, p. 281; 3 Ch. D. 793; 46 L. J. Ch. D. 64; 24 W. R. 962.

(l) *Ante*, p. 260; 25 W. R. 410; W. N. 1877, 76.

(m) *Gilbert v. Smith*, 2 Ch. D. 686; 45 L. J. Ch. D. 514; 45 L. T. N. S. 43.

(n) *Mellor v. Sidebottom*, 21 S. J. 297; on appeal, 5 Ch. D. 342; 46 L. J. Ch. D. 398; 37 L. T. N. S. 7; 25 W. R. 401.

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[RULE I.]

of the pleadings in the action other than any petition or summons; such copy shall be in print, except such parts (if any) of the pleadings as are by these Rules permitted to be written: Provided that no copy need be delivered of any pleading a copy of which has been delivered on entering any previous judgment in such action. The forms in Appendix (D.) hereto may be used with such variations as circumstances may require.

In the case of *Reg. v. Scott (a)*, which was an indictment for perjury alleged to have been committed on the trial of an action, it was held that the copy of pleadings filed under this rule, and the copy of writ filed under O. V., r. 7, sufficiently proved the existence of the action when produced by the officer of the Court.

[RULE II.]

Entry to be dated as of day on which judgment is pronounced.

2. Where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date.

[RULE III.]

In all other cases entry as of day on which requisite documents are left with officer.

3. In all cases not within the last preceding Rule, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date.

[RULE IV.]

Officer to examine affidavit or document, and, if correct, enter judgment accordingly.

4. Where under the Act or these Rules, or otherwise, it is provided that any judgment may be entered or signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular and contain all that is by law required, he shall enter judgment accordingly.

[RULE V.]

Production of order or certificate, sealed with seal of Court or of such return, shall be authority to officer to enter judgment.

5. Where by the Act or these Rules, or otherwise, any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to enter judgment accordingly.

[RULE VI.]

Judgment of nonsuit, unless otherwise ordered, to have effect of judgment for defendant on m

6. Any judgment of nonsuit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, any judgment of nonsuit may

(a) *Ante*, p. 176; 2 Q. B. D. 415; 45 L. J. M. C. 259; 36 L. T. N. S. 476; 25 W. R. 697.

be set aside on such terms, as to payment of costs and otherwise, as to the Court or a Judge shall seem just.

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[RULE VI.]

Where a party formerly would have elected to be nonsuited, the Judge now interferes, and directs the judgment of nonsuit to have the same effect as formerly (a).

ORDER XLII.

EXECUTION.

Ord. 42.

[RULE I.]

1. A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the said Act might have been enforced at the time of the passing thereof.

How judgment for money to be enforced.

The object of this rule seems to be to give to every one obtaining judgment in a cause in any division of the High Court, all the remedies for carrying his judgment into effect, which were in use in any of the Courts formerly, whether of Common Law or Equity. The procedure at Common Law was by writ of execution—that is to say, *fi. fa.*, *ca. sa.*, *elegit*, or *levari facias*, which last was used in the case of a beneficed clergyman, and was a writ to the bishop enabling him to seize the profits of the benefice. In Chancery the ordinary and old remedy of the Court was by attachment and sequestration, but stat. 1 & 2 Vict. c. 110, gave to the Court of Chancery the writs of *fi. fa.*, *elegit*, and the writ ancillary to *fi. fa.*, *venditioni exponas*, and writs of *fi. fa. de bonis ecclesiasticis* and *sequestrari facias de bonis ecclesiasticis*, adapted to the case of incumbents who have no goods and chattels or lay fee in the bailiwick, and by this Act all interlocutory decrees, whether rules at Common Law or Equity for the payment of money, costs, charges, or expenses, are enforceable as judgments. Interlocutory orders of the Common Law Courts were always enforceable by attachment (b).

Extends to all Divisions every remedy of each.

2. A judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorised by law, by attachment.

[RULE II.]

May be enforced by sequestration.

As to writ see **O. XLVII.**

The form of this rule gives rise to a doubt whether sequestration and attachment, where it is legally available, are not now made merely alternative remedies for enforcing payment of money into Court, instead of being as formerly successive remedies in general, as they were under Consolidated Orders 28, rule 3, in which the defaulting party was in general first attached, and on this process being ineffectual, then recourse was had to sequestration, which might also have been had where *non est inventus* was returned to the writ of attachment. It is, however, apprehended that the effect of the rule will be held to be to render the previous attachment unnecessary, but not to deprive a person who has proceeded by attachment from resorting to sequestration if it be found desirable. See, however, *post*, r. 24 of this order.

(a) *Mattock v. Neath*, 20 S. J. 232.

(b) See on this rule *Williams v. Bolland*, 1 C. P. D. 227; 34 L. T. N. S. 904; 24 W. R. 644.

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COURT.**Ord. 42.**

[RULE III.]

[RULE IV.]

Judgment for
recovery of
other property
than land or
money.

3. A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.

4. A judgment for the recovery of any property other than land or money may be enforced :

By writ for delivery of the property :

By writ of attachment :

By writ of sequestration.

See as to above specific writs, Orders **XL.**, **XLIV.**, and **XLVII.**

[RULE V.]

Judgment re-
quiring person
to do any act
other than pay
money, &c., en-
forceable by
attachment or
committal.

5. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.

On notice of motion for order to commit defendant in contempt for non-appearance, the order was made that a writ of attachment should issue (a).

[RULE VI.]

Meaning of
"writ of exe-
cution" and of
"issuing exe-
cution."

6. In these Rules the term "writ of execution" shall include writs of fieri facias, capias, elegit, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding Rules of this Order shall be applicable to the case.

[RULE VII.]

Where judg-
ment is for
relief con-
ditionally, &c.

7. Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party. And the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried.

(a) *Piper v. Piper*, W. N. 1876, 202.

8. Where a judgment is against partners in the name of a firm, execution may issue in manner following :

- (a.) Against any property of the partners as such :
- (b.) Against any person who has admitted on the pleadings that he is, or has been adjudged to be a partner :
- (c.) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

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[RULE VIII.]

Judgment against partners in name of firm how execution may issue.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do ; and the Court or Judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

9. No writ of execution shall be issued without the production to the officer by whom the same should be issued, of the judgment upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

[RULE IX.]

No writ of execution to be issued without production to officer, of judgment or office copy showing date of entry.

But in *Bolton v. Bolton* the plaintiff having given notice of discontinuance, and the defendant having taxed his costs, brought a writ of *fi. fa.* to recover them which was refused, no judgment being produced. Hall, V.-C., on application to him, ordered the writ to issue, and amended the Form No. 1, Appendix F (a).

10. No writ of execution shall be issued without the party issuing it, or his solicitor, filing a præcipe for that purpose. The præcipe shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued ; and shall be signed by the solicitor of the party issuing it, or by the party issuing it, if he do so in person. The forms in Appendix (E.) hereto may be used, with such variations as circumstances may require.

[RULE X.]

No writ of execution to issue without filing præcipe for it.

Contents of præcipe.

Form of præcipe.

(a) *Ante*, p. 281 ; 3 Ch. D. 276 ; 35 L. T. N. S. 358 ; 24 W. R. 663 ; see, however, remarks, 20 S. J. 581.

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[RULE X.]

This rule has been amended by the rules of the Supreme Court, June, 1876, as follows:—

Order XLII., Rule 10, of "The Rules of the Supreme Court" shall be read as if the words "or on behalf of" had been inserted after the words "signed by."

These rules are substituted for R. G. H., 1853, Rule 71, and are somewhat fuller in detail, but much to the same effect.

[RULE XI.]

Every writ of execution to be indorsed with name and place of abode or office of solicitor actually suing it out, &c.

11. Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be.

This is nearly in terms a re-enactment of R. G. H., 1853, Rule 73.

[RULE XII.]

To bear date day of issue.

12. Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix (F.) hereto may be used, with such variations as circumstances may require.

This is substituted for R. G. H., 1853, Rule 72. See notes on forms in Appendix (F.), *post*.

[RULE XIII.]

In execution poundage fees may be levied.

13. In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered.

[RULE XIV.]

Writ of execution for recovery of money to be indorsed with direction to sheriff or officer to whom directed, &c.

14. Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4*l.* per cent. per annum from the time when the judgment was entered up, provided that in cases where there is an agreement between the parties that more than 4*l.* per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

It was said formerly that if too much were indorsed on the writ by mistake and levied, the excess should be ordered to be refunded and with costs, but it seems the writ was not irregular (*a*): if too little, the defendant would be compelled by the rule to pay the difference, or in default the plaintiff was allowed to issue a new writ (*b*), but it would appear not after arrest on a *ca. sa.* for the less amount (*c*). Since the incorporation of the High Court of Admiralty in the High Court of Justice, an award of salvage is a judgment debt, and as such bears interest from the date of entry of judgment, the taxed costs bearing interest from the date of signing of the allocatur (*d*).

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[RULE XIV.]

If too much indorsed on writ.

15. Every person to whom any sum of money or any costs shall be payable under a judgment, shall immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of fieri facias, or one or more writ or writs of elegit, to enforce payment thereof, subject nevertheless as follows:

[RULE XV.]

Every one to whom any money or costs shall be payable under judgment, immediately after entry, entitled to fieri facias or elegit, &c.

(*a*.) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

(*b*.) The Court or Judge at the time of giving judgment, or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of the periods herein-before prescribed.

This stands instead of R. G. H., 1853, Rule 57, which is somewhat varied by it. The old rule was as follows: "When a plaintiff or defendant has obtained a verdict in term, or in case a plaintiff has been nonsuited at the trial in or out of term, judgment may be signed and execution issued thereon in fourteen days, unless the Judge who tries the cause, or some other Judge, or the Court, shall order execution to issue at an earlier or later period, with or without terms." This rule was held to apply where a verdict was taken subject to a reference, though the reference included all matters in difference (*e*).

Replaces R. G. H., 1853, Rule 57.

16. A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner herein-after provided; but such writ may, at any time before its expiration, by leave of the Court or a Judge, be renewed, by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of

[RULE XVI.]

Writ of execution remains in force for year from issue, but may be renewed by leave, &c.

(*a*) See *Tilby v. Best*, 16 East, 163.

(*b*) *Hunt v. Passmore*, 2 D. P. C. 414.

(*c*) *Smith v. Dickinson*, 5 Q. B. 602.

(*d*) *The Jones Brothers*, 37 L. T. N. S. 164.

(*e*) *O'Toole v. Pott*, 7 E. & B. 102.

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[RULE XVI.]

—

the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

This is almost in terms, and entirely in effect, the same as the Common Law Procedure Act, 1852, s. 124.

[RULE XVII.]

Production of
writ or notice
sealed, evidence
of renewal.

17. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding Rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

This also is the same as the Common Law Procedure Act, 1852, s. 125.

[RULE XVIII.]

When execu-
tion may issue

18. As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.

15 & 16 Vict.
c. 76, s. 128.

Formerly must
issue within
year and day.

Otherwise sci.
fa. necessary.

This rule does not seem to change the law as it formerly existed, but it is expressed now in clearer and more comprehensive terms than hitherto. The mode in which substantially the same was before enacted was as follows in 15 & 16 Vict. c. 76, s. 128:—"During the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a scire facias, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment." Before this enactment, unless execution had been suspended by agreement (*a*), it must have been issued within a year and a day after judgment was signed; after that time, if no writ had been issued, and there was no agreement dispensing with a scire facias (*b*), the judgment was presumed to have been satisfied, and no execution could ever after have been issued thereon, but a scire facias must have been sued out and a fresh judgment obtained, on which alone the execution must have been levied (*c*). A writ after the year and a day on the old judgment, unless there was an agreement waiving scire facias, was irregular, and the execution might be set aside, or the opposite party might bring error, but it was not void (*d*). But if the writ issued before the expiration of the year and a day it might have been executed afterwards, even more than a year after it issued, and without any

(*a*) *Hiscocks v. Kemp*, 3 Ad. & El. 676; *Dolling v. White*, Bail Ct. Ca. L. & M. 170; 22 L. J. Q. B. 327.

(*b*) *Morgan v. Burgess*, 1 Dowl. N. S. 850.

(*c*) Even though the scire facias was issued without necessity: *Davis v. Norton*, 1 Bing. 133.

(*d*) *Blanchway v. Burt*, 4 Q. B. 707; overruling *Mortimer v. Piggot*, 4 A. & E. 363 n.

return or entry on the roll (*a*), and if unexecuted, another writ of a different kind might have been issued after the year and a day (*b*). Under the practice immediately preceding the present Act, however, if proceedings in error have been taken and bail been put in where necessary (*c*), or proceedings have been stayed by injunction (*d*), execution could not have issued, and it is submitted that the law in these cases is not altered by the rule.

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[RULE XVIII.]

19. Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms, as to costs or otherwise, as shall seem just.

[RULE XIX.]

After six years or change in parties, party claiming execution to apply for leave. Court to make order for execution or for determining rights of parties, &c.

By the former law in the circumstances provided for by this rule the party alleging himself entitled to execution might either sue out a writ of revivor in the form mentioned thereafter, or apply to the Court or a Judge for leave to enter a suggestion upon the roll to the effect that it manifestly appeared to the Court that he was entitled to have execution of the judgment and to issue execution thereon, which leave was granted by the Court or Judge upon a rule to show cause, or a summons to be served according to the heretofore existing practice, or in such manner as such Court or Judge should direct (*e*) in the form thereafter given (*f*), and upon such application, in case it manifestly appeared that the party making application was entitled to execution, the Court or Judge allowed such suggestion to be entered in the form given (*g*), or to the like effect, and execution thereon, and made an order whether or not the costs of such application should be paid to the party making it; and in case it should not manifestly so appear, the Court or Judge discharged the rule or dismissed the summons, with or without costs; but, nevertheless, in the last-mentioned case the party making the application was at liberty to proceed by writ of revivor or action on the judgment (*h*). The full details of the proceedings in such case can be found by reference to the sections before cited and the succeeding sections (*i*).

Former practice in such case.

(*a*) *Simpson v. Heath*, 5 M. & W. 631; *Greenshields v. Harris*, 9 M. & W. 774.

(*b*) *Franklin v. Hodgkinson*, 3 D. & L. 554.

(*c*) *Levy v. Price*, 2 M. & W. 533; *Semple v. Turner*, 6 M. & W. 152.

(*d*) 15 & 16 Vict. c. 76, s. 226; *secus* formerly, *Forman v. Jeyes*, 5 B. & Ad. 835.

(*e*) 15 & 16 Vict. c. 76, s. 129.

(*f*) Sched. A, No. 7, to same Act.

(*g*) Sched. A, No. 8, to same Act.

(*h*) 15 & 16 Vict. c. 76, s. 130.

(*i*) 15 & 16 Vict. c. 76, ss. 128 to 134 inclusive.

RULES OF COURT.

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[RULE XX.]

Every order enforceable as judgment. Former practice.

20. Every order of the Court or a Judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect.

Hitherto no order made by a single Judge at chambers could be enforced, if not obeyed, until it was first by motion made a rule of Court (*a*), but then it might, if for payment of money, or costs, be enforced either by attachment or by execution (*b*), but not by action (*c*), if otherwise by attachment only, this motion, by the present rule, becomes unnecessary.

But, in the case of *Philpott v. Lehain* it was held that payment under a rule of Court may now be enforced by action, and is therefore a fit subject for set-off or counter-claim (*d*). With reference to this rule see *Piper v. Piper* (*e*).

[RULE XXI.]

Person not party in action having obtained order to be entitled as if party to action, and person not party against whom order made, liable as party to action.

21. In cases other than those mentioned in Rule 18 any person not being a party in an action, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such or by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action.

This rule seems to introduce a practice altogether new at Common Law, but in Chancery orders made on petition against respondents were enforceable as if the respondents were parties to a suit.

[RULE XXII.]

Auditâ querelâ abolished. Party against whom judgment given may apply to stay execution on grounds arising too late to be pleaded.

22. No proceeding by auditâ querelâ shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief and upon such terms as may be just.

It has been held that costs at nisi prius generally follow the event, though the Judge may at the trial, upon application, make any order as to them which he thinks fit; but if such order be not made at the trial the Judge, notwithstanding this rule, has no jurisdiction (*f*).

(a) 1 Tidd's Pr., 9th ed. 511.

(b) See *Badman v. Pugh*, 5 M. & G. 381.

(c) *Hookpayton v. Bussell*, 10 Ex. 24.

(d) 35 L. T. N. S. 855; 20 S. J. 605.

(e) *Ante*, p. 398; W. N. 1876, 202.

(f) *Baker v. Oakes*, 2 Q. B. D. 171; 46 L. J. Q. B. D. 246; 35 L. T. N. S. 671, 832; 25 W. R. 220.

23. Nothing in any of the Rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever.

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[RULE XXIII.]

Former rights
not curtailed.

[RULE XXIV.]

24. Nothing in this Order shall affect the order in which writs of execution may be issued.

ORDER XLIII.

Ord. 43.

WRITS OF FIERI FACIAS AND ELEGIT.

1. Writs of fieri facias and of elegit shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed.

[RULE I.]

Writs of fi. fa.
and elegit to be
as before Act.

2. Writs of venditioni exponas, distringas nuper vice comitem, fieri facias de bonis ecclesiasticis, sequestrari facias de bonis ecclesiasticis, and all other writs in aid of a writ of fieri facias or of elegit, may be issued and executed in the same cases and in the same manner as heretofore.

[RULE II.]

Writs of ven-
ditioni
exponas, &c.
to be as here-
tofore.

ORDER XLIV.

Ord. 44.

ATTACHMENT.

1. A writ of attachment shall have the same effect as a writ of attachment issued out of the Court of Chancery has heretofore had.

[RULE I.]

Effect of writ
of attachment.

2. No writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued.

[RULE II.]

None to be
issued without
leave of Court
or Judge.

Costs of a writ of attachment should be applied for at the same time as the writ (a). By **Form No. 9, App. F.** no date for the return of writ by the sheriff is given. The Vice-Chancellor nevertheless ordered the writ to issue in that form, considering that no difficulty would arise from the omission of the date, and thought that after a reasonable interval the plaintiff might, if no return were made, require the sheriff to make a return (b). An attachment for want of answer, notwithstanding this rule, was allowed without notice, since the Acts came into operation in a cause under the

(a) *Abud v. Riches*, 2 Ch. D. 528 ; 45 L. J. Ch. D. 649 ; 34 L. T. N. S. 713
24 W. R. 637.

(b) *Owen v. Pritchard*, W. N. 1876, 147.

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COURT.

Ord. 44.

[RULE II.]

Application
should not be
made *ex parte*.

old practice (a). But the rule was otherwise where the matter was one in which the order was perfected before the Acts came into operation (b). The new practice was enforced in *Baigent v. Baigent* (c). This case was, however, in some points modified by the Judge, who decided in a subsequent case (d). A suit was instituted in 1874 for delivery up of furniture and documents. No answer was required; but in December, 1875, the defendant put in a voluntary answer. In May, 1876, an order was obtained that the defendant should, within forty days after service, put in a sufficient affidavit of documents. This order, served on May 30th, was not obeyed, and on June 19th, the plaintiff moved *ex parte* for writ of attachment against the defendant. The writ issued, and the defendant was taken under it, and detained in prison. The question then raised was, whether, no notice having been given to the defendant, the writ had properly issued? The Vice-Chancellor held that as the plaintiff could on the 1st November, 1875, have moved for decree, therefore (see 20 S. J. 33, 24 W. R. 19) the new practice applied, and the writ was improper without notice, and was accordingly discharged (e). In *Clarke v. Roche* (f) an application was made *ex parte* to the Court of Appeal for a rule calling on one of the defendants, and on the printer of a newspaper, to attend the Court and answer for a contempt alleged to have been committed by them, by publishing in the newspaper a letter written by the defendant commenting upon the proceedings in the action, the only authority cited that the application could be made *ex parte* was *The Queen v. Castro*, L. R. 9 Q. B. 219. The Court said that what was done in that case, a criminal trial before a jury, was no authority for making such an application in a civil action, that it was entirely contrary to practice to make an application of the kind *ex parte*, and they treated it as absurd, that any Judge should be influenced in the conduct of a trial by the comments of a newspaper.

In a case of *The Protector Loan Co. v. Whitlam*, it was held that a party applying for the attachment of a judgment debtor for non-compliance with an order for his oral examination, must make an affidavit that conduct money has been tendered to the debtor, and also there must be an affidavit showing some good reason why the debtor should not be examined in the district where he lives, and also that there were no other means of ascertaining what debts were owing to the debtor (g). See analogy to practice under Debtors Act, 1869. It has been held that notice served on the solicitor of the party to be attached is sufficient under this rule where the party himself could not be found (h).

Ord. 45.

ORDER XLV.

ATTACHMENT OF DEBTS.

[RULE I.]

Party having

1. Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may

(a) *Garling v. Royds*, 1 Ch. D. 81; 45 L. J. Ch. D. 56; 24 W. R. 23.

(b) *Re a Solicitor*, 1 Ch. D. 445; *Anon.*, 24 W. R. 103.

(c) 1 P. D. 421; 33 L. T. N. S. 462; 24 W. R. 43; *sub nom.* in the goods of *Baigent*.

(d) *The goods of Cartwright*, 1 P. D. 422; 34 L. T. N. S. 72; 24 W. R. 214.

(e) *Dallas v. Glyn*, 3 Ch. D. 190; 46 L. J. Ch. D. 51; 34 L. T. N. S. 897; 24 W. R. 881.

(g) 36 L. T. N. S. 467.

(h) *Richards v. Kitchen*, W. N. 1877, 128; 36 L. T. N. S. 730; 25 W. R. 602; see also *Browning v. Sabin*, 5 Ch. D. 511; 46 L. J. Ch. D. 728.

apply to the Court or a Judge for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him, before an officer of the Court, or such other person as the Court or Judge shall appoint; and the Court or Judge may make an order for the examination of such judgment debtor, and for the production of any books or documents.

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[RULE I].

judgment may apply orally to examine debtor as to debts.

This rule is very similar to the 60th section of (the Common Law Procedure Act, 1854) 17 & 18 Vict. c. 125. The only difference is in the wording, the old clause being: It shall be lawful for any creditor who has obtained a judgment in any of the superior Courts, to apply, &c., the words "an officer" of the Court being in the old clause "a master" of the Court, and the clause is continued in the following words, "and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this Act."

17 & 18 Vict. c. 125, s. 60.

Under the former law it was provided that the Judge might in his discretion refuse to interfere where from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious (*a*). This clause, however, seems deliberately to be omitted now, as the section immediately succeeding it is re-enacted, and it would therefore seem to be the intention to repeal it unless it be deemed to have been of no effect and unnecessary. It was held, however, that an executor could not avail himself of this proceeding on a judgment obtained by his testator without making himself a party to the record by suggestion or writ of revivor under the former practice (*b*). Probably now an application should in such case be made under **O. XLII., r. 19**. The creditor entitled to apply under the enactment of the Common Law Procedure Act, 1854, s. 60, must have been one entitled to enforce immediate payment; and therefore the holder of the bond of a corporation containing a condition that all bondholders should be paid, *pari passu*, was held not to be such a creditor, since an attachment would have given him priority over other bondholders (*c*), and there is no reason to suppose that the law is in any wise altered in this respect. A party to an interpleader issue, who had obtained an order for his costs, was held a judgment creditor under the old clause (*d*), and would without doubt be entitled to apply under the new rule.

Apparent omission of discretionary clause of C. L. P. Act, 1860.

Executor could not act under clause without first making himself party.

Holder of bond on condition that holders should be paid *pari passu*, not entitled to attachment.

2. The Court or a Judge may, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (herein-after called the garnishee) to the judgment debtor shall be attached to answer the judg-

[RULE II.]

Court or Judge may order attachment of debts.

(*a*) 23 & 24 Vict. c. 126, s. 28.

(*b*) *Baynard v. Simmons*, 5 E. & B. 59.

(*c*) *Kennet v. Westminster Improvement Commissioners*, 11 Ex. 349.

(*d*) *Hartley v. Shemwell*, 1 B. & S. 1.

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COURT.

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[RULE II.]

ment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge or an officer of the Court, as such Court or Judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

17 & 18 Vict.
c. 125, s. 61.

This is in terms the same as the Common Law Procedure Act, 1854, s. 61, save that in that section a Judge only was mentioned in every case, in which now "the Court or a Judge" stands, and where now the words "an officer" of the Court stand, the words were formerly "a master" of the Court.

No attachment
after ca. sa.

It was held that if ca. sa. had issued on a judgment, no attachment could afterwards issue under this procedure (a). Nothing could be attached but an actual debt; no mere gratuity (b), nor legacy (c), nor claim for unliquidated damages, as on a bond for indemnity (d), nor the amount of a verdict in an action for unliquidated damages before signing of judgment (e); but rent was attachable under the Act (f); the debt also must be due to the judgment debtor himself. So an annuity granted to his wife, *dum sola*, could not be attached (g), but a debt due to one of joint debtors might be attached (h), and so might a debt due to a testator's estate on a judgment against his executor as such, notwithstanding a decree for administration of the estate (i). The debt should be one which the judgment debtor would have a right to apply in discharge of the judgment; so a debt which has been assigned, cannot be attached (k). It has been held that money in the hands of an official manager, under a winding up order, may be attached (l), but not money paid into the Court of Admiralty, as the proceeds of the sale of a ship (m). Nor could a creditor by order of a Court of Equity levy this debt by attachment under this clause (n); the right was only in a judgment creditor at common law. But a debt, though not actually payable, if accruing, might have been attached (o).

Debt must be
due to judg-
ment debtor in
person.

Debt assigned
could not be
attached.

Creditor by
order in Chan-
cery could not
attach.

But now it seems that debts not yet due may be attached, and it is quite clear that equitable debts may now be attached as well as legal (p). An affidavit stated that the debt was "owing and accruing." The Master refused a garnishee order because it was not stated that the debt was due. Quain, J., reversed the Master's order, but said the attachment must be limited to that part of the sum which was stated to be accruing at the time of the judgment (q). On an application for an order to attach "a

- (a) *Jauralde v. Parker*, 6 H. & N. 431.
- (b) *Innes v. East India Co.*, 17 C. B. 351.
- (c) *Macdonald v. Hollister*, 3 W. R. 522.
- (d) *Johnson v. Diamond*, 11 Ex. 73.
- (e) *Jones v. Thompson*, E. B. & E. 63; *Dresser v. Johns*, 6 C. B. N. S. 429.
- (f) *Mitchell v. Lee*, L. R. 2 Q. B. 259.
- (g) *Dingley v. Robinson*, 26 L. J. Ex. 55.
- (h) *Miller v. Mynn*, 1 E. & E. 1075.
- (i) *Burton v. Roberts*, 6 H. & N. 93.
- (k) *Hirsch v. Coates*, 18 C. B. 757.
- (l) *Ex parte Turner*, 30 L. J. Ch. 92.
- (m) *The Wild Ranger*, 2 N. R. 402.
- (n) *The Financial Corporation, Limited, re Price*, L. R. 4 C. P. 155.
- (o) *Tapp v. Jones*, L. R. 10 Q. B. 591.
- (p) *Wilson v. Dundas*, W. N. 1875, 232; 20 S. J. 99; *anon*, W. N. 1876, 9.
- (q) *Anon.*, W. N. 1876, 9; 20 S. J. 178.

debt" in the hands of the Metropolitan Board of Works upon an affidavit, stating that the Metropolitan Board of Works are or will be indebted to the judgment debtor in a sum for compensation in respect of certain premises required by them at, &c., with respect to which the Board had given the judgment debtor notice to treat. It was held not to be a "debt owing or accruing" (a).

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Ord. 45.

[RULE II.]

3. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Court or Judge shall direct, shall bind such debts in his hands.

[RULE III.]

Order for
attachment to
bind debts.

This is identical with sect. 62 of the Common Law Procedure Act, 1854, with the same substitution of "Court or Judge" for "Judge" alone, as before noted. 17 & 18 Vict. c. 125, s. 62.

If the judgment debtor became bankrupt before payment, however, the debts were not bound by this procedure as against his assignees (b). See however, cases decided since the Bankruptcy Act, 1869 (c).

4. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Court or Judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt.

[RULE IV.]

Proceedings to
levy amount
due from gar-
nishee to judg-
ment debtor.

This is the same as sect. 63 of the Common Law Procedure Act, 1854, with the same difference as above noted, save that in this order the words "it may issue accordingly," are in the former section, "it may be sued forth accordingly," and the words "or so much thereof as may be sufficient to satisfy the judgment debt," are supplied at the end of the order, which seem by mistake to have been omitted before. Attachment under these orders resembles actual seizure by sheriff, and gives the creditor who has obtained a garnishee order absolute security within the Bankruptcy Act, 1869, s. 12, and Order 2 (d).

17 & 18 Vict.
c. 125, s. 63.

5. If the garnishee disputes his liability, the Court or Judge, instead of making an order that execution shall issue,

[RULE V.]

Court or Judge

(a) *Richardson v. Elmit*, 2 C. P. D. 9; 36 L. T. N. S. 58.

(b) *Holmes v. Tutton*, 5 E. & B. 65; *Turner v. Jones*, 1 H. & N. 878; *Tilbury v. Brown*, 30 L. J. Q. B. 46.

(c) *Emmanuel v. Bridger*, L. R. 9 Q. B. 286; *Lowe v. Blackmore*, L. R. 10 Q. B. 485; dissenting from *Ex parte Greenway*, L. R. 16 Eq. 619; but see *Stevens v. Philips*, L. R. 10 Ch. 417; *London Cotton Mills Co. in re Brander*, W. N. 1876, 283; 25 W. R. 109; and see *Slater v. Pinder*, L. R. 6 Ex. 228; *Ex parte Locke*, L. R. 6 Ch. 795; *Ex parte Williams*, L. R. 7 Ch. 314, and *Ex parte Jones*, W. N. 1875, 175.

(d) *Emmanuel v. Bridger*, L. R. 9 Q. B. 286.

RULES OF
COURT.**Ord. 45.**

[RULE V.]

may allow
judgment cre-
ditor to sue
garnishee.

Writ was not
granted with-
out some
reason.

may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

The object to be effected by this rule is substantially the same as by s. 64 of the Common Law Procedure Act, 1854, but the machinery is somewhat changed. The former power of the Judge under that section was held to be discretionary (*a*) and not *ex debito*. If the judgment creditor declines to proceed, the garnishee was entitled to have the *ex parte* order dismissed with costs (*b*). If he proceed, the successful party recovered his costs, though nothing was said of them in the section (*c*). To entitle the garnishee to a writ under sect. 64 formally he must satisfy the Court or Judge that he had real reason for disputing his liability (*d*).

This rule has been made use of in the case before cited of *Wilson v. Dundas* (*e*).

[RULE VI.]

Proceedings
where third
person has a
lien on the debt.

6. Wherever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or Judge may order such third person to appear, and state the nature and particulars of his claim upon such debt.

23 & 24 Vict.
c. 126, s. 29.

This is almost identical with the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 29, the only difference being that the words "or that any third person has," &c., are in the former Act, "who has," &c., and that now the words "the Court or Judge" take the place of "the Judge."

[RULE VII.]

Court or Judge
may bar claim
of third person
and make
orders.

7. After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Court or Judge may order to appear, or in case of such third person not appearing when ordered, the Court or Judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding Rules of this Order, and may bar the claim of such third person, or make such other order as such Court or Judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Court or Judge shall think just and reasonable.

(a) *Wise v. Birkenshaw*, 29 L. J. Ex. 240.

(b) *Wintle v. Williams*, 3 H. & N. 288.

(c) *Johnson v. Diamond*, 11 Ex. 431.

(d) *Newman v. Rook*, 4 C. B. N. S. 434.

(e) *Ante*, p. 408 ; W. N. 1875, 232 ; 20 S. J. 99 ; *anon*, W. N. 1876, 9.

This is also identical with the Common Law Procedure Act, 1860, s. 30, the differences introduced by r. 5 into the practice being *ex necessitate rei* observed and continued in this rule accordingly.

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8. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside, or the judgment reversed.

[RULE VIII.]

Garnishee
discharged.

This is the same as the Common Law Procedure Act, 1854, s. 65. The payment, to be a discharge, should be under an actual order to pay and not under a mere *ex parte* attachment, and it must be an actual payment in money, not by bills, unless they be accepted as payment (a).

17 & 18 Vict.
c. 125, s. 65.

9. There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person upon application to the proper officer.

[RULE IX.]

Attachment
book to be kept
by officer.

This is the same as the Common Law Procedure Act, 1854, s. 66; but the wording is slightly altered, the old rule ordering that "in each of the superior Courts there should be kept, at the master's office, &c.," and the words "any master" being used instead of "the proper officer" at the end.

17 & 18 Vict.
c. 125, s. 66.

10. The costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a Judge.

[RULE X.]

Costs of appli-
cation.

This is the same as the Common Law Procedure Act, 1854, s. 67.

17 & 18 Vict.
c. 125, s. 67.

ORDER XLVI.

Ord. 46.

CHARGING OF STOCK OR SHARES AND DISTRINGAS.

1. An order charging stock or shares may be made by any Divisional Court or by any Judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1.

[RULE I.]

Order charging
stock or shares
may be made
by Court or
Judge.

(a) *Turner v. Jones*, 1 H. & N. 878.

RULES OF
COURT.

Ord. 46.

[RULE I.]

Stock and
shares in public
funds and pub-
lic companies
belonging to
the debtor and
standing in his
own name to be
charged by
order of a
Judge.

Order of Judge
to be made in
first instance
ex parte, and
on notice to the
bank or com-
pany to operate
as a *distringas*.

It is no longer necessary to procure a charging order in the Court where judgment issued, before applying for a stop order, as it was formerly (a). An order was made under this rule, charging shares with the amount of costs when taxed (b); but see *Widgery v. Tepper* (c).

The sections referred to in the rule are as follows:—

By 1 & 2 Vict. c. 110, s. 14, it is enacted: "That if any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor: provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order." See *Bagnall v. Carlton*, 36 L. T. N. S. 730.

Sect. 15. "And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares here authorised to be charged for the benefit of the judgment creditor under an order of a Judge, Be it further enacted, That every order of a Judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only, and such order, if any government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall within a time to be mentioned in such order, show to a Judge of one of the said Superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: Provided that any such Judge shall, upon the application of

(a) *Hopewell v. Barnes*, 1 Ch. D. 630; 33 L. T. N. S. 777; 24 W. R. 629.

(b) *Burns v. Irving*, 3 Ch. D. 291; 46 L. J. Ch. D. 423; 34 L. T. N. S. 752; 25 W. R. 66.

(c) W. N. 1877, 196; 21 S. J. 749.

the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

RULES OF
COURT.

Ord. 46.

[RULE I.]

Provisions of
recited Act,
1 & 2 Vict.
c. 110, as to
property of
judgment
debtors defined
and extended.

By 3 & 4 Vict. c. 82, s. 1, the provisions of 1 & 2 Vict. c. 110, as to the property of judgment debtors are defined and extended in the following words: "It is enacted that the aforesaid provisions of the said Act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities, or shares as aforesaid, which now are or shall hereafter be standing in the name of the Accountant-General of the Court of Chancery or the Accountant-General of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such Judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: provided always, that no order of any Judge as to any stock, funds, annuities, or shares, standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public Company, from permitting any transfer of such stock, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery, or the Court of Exchequer respectively, may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order."

2. Any person claiming to be interested in any stock transferable at the Bank of England standing in the name of any other person may sue out a writ of distringas pursuant to the statute 5 Vict. c. 8, as heretofore. Such writ to be issued out of any office of the High Court in London, where writs of summons are issued.

[RULE II.]

Distringas of
stock.

? 5 Vict. c. 5.

There appears to be an error in the print in this rule: 5 Vict. c. 8, is printed, it would seem, for 5 Vict. c. 5. The rule seems to stand for Consolidated Order XXVII., Rule 1.

Consolidated
Orders, Order
XXVII. Rule 1.

Under that rule, or one in the same terms, it was held that a party who had obtained a distringas under the 5th section of 5 Vict. c. 5, might nevertheless also obtain an injunction under the 4th section of the same Act (a), but the order would not be indefinitely continued if no bill were filed (b), though the filing of a bill did not necessarily discharge the writ (c).

In the Record and Writ Clerk's Office, in which alone these writs formerly issued, the solicitor issuing any such writ is required to file the usual certificate, that the lower scale of costs is applicable only in certain

(a) *Re Marquis of Hertford*, 1 Ph. 129; see also *Ex parte Amyot*, cited in notes to that case, 130.

(b) *S. C.*, 1 Ha. 584.

(c) *S. C.*, 1 Ph. 203.

RULES OF
COURT.**Ord. 46.**

[RULE II.]

Court of Chan-
cery may sum-
marily restrain
the Bank of
England, &c.,
from permit-
ting transfer of
stock, &c.

Writ of dis-
tringas to be
issued from the
Court of Chan-
cery according
to the form in
the first sche-
dule to this
Act.

cases where the precise sum of stock on which the writ is to operate, is not apparent on the face of the affidavit. Where the precise sum is not known, and cannot be specified in the affidavit, the affidavit is usually to the effect that A. B. is beneficially interested in "a certain sum of three per cent. consolidated bank annuities (or, &c.) standing in the names of, &c." If in any such case the precise sum is not known, but it is known to be under the value of £1,000, and the lower scale is claimed, there only the usual certificate, that the lower scale is applicable, is required to be filed (a).

The sections referred to in the rule are as follows:—

By sect. 4 of 5 Vict. c. 5, it is enacted "that it shall be lawful for the said Court of Chancery upon the application of any party interested, by motion or petition, in a summary way, without bill filed, to restrain the Governor and Company of the Bank of England, or any other public company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company, which may be standing in the name or names of any person or persons, or body politic or corporate, in the books of the Governor and Company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon; and every order of the said Court of Chancery upon such motion or petition as aforesaid shall specify the amount of the stock or the particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same shall be standing: provided always, that the said Court of Chancery shall have full power upon application of any party interested, to discharge or vary such order, and to award such costs, upon such application, as to the said Court shall seem fit.

And by sect. 5 it is enacted "That in the place and stead of the writ of distringas, as the same has been heretofore issued from the said Court of Exchequer, a writ of distringas in the form set out in the first schedule to this Act shall be issuable from the Court of Chancery, and shall be sealed at the subpoena office, and that the force and effect of such writ, and the practice under or relating to the same, shall be such as is now in force in the said Court of Exchequer: provided nevertheless, that such writ, and the practice under or relating to the same, and the fees and allowances in respect thereof, shall be subject to such orders and regulations as may, under the provisions of this Act, or of any other Act now in force, or under the general authority of the Court of Chancery, be made with reference to the proceedings and practice of the said Court of Chancery.

"FIRST SCHEDULE.

"Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the faith, to the Sheriffs of London, greeting: We command you that you omit not, by reason of any liberty, but that you enter the same, and do distrain the Governor and Company of the Bank of England by all their lands and chattels in your bailiwick, so that they, or any of them, do not intermeddle therewith until we otherwise command you; and that you answer us the issues of the said lands, so that they do appear before us in our High Court of Chancery on the day of _____ to answer a certain bill of complaint lately exhibited against them and other defendants before us in our said Court of Chancery, by _____ complainant; and further to do and receive what our said Court shall then and there order in the premises, and that you then leave there this writ. Witness ourself at Westminster the _____ day of _____ in the _____ year of our reign.

"DEVON."

(a) 20 S. J. 91.

ORDER XLVII.

WRIT OF SEQUESTRATION.

Ord. 47.

Where any person is by any judgment directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment shall at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery.

Where person neglects to fulfil order of Court within time ordered after due service of order, party prosecuting order may have writ of sequestration against him similar to former writ of sequestration in Chancery.

The rule which this most nearly resembles was the Consolidated Order XXIX., r. 3, which gave first a writ of attachment, next, on that being inefficacious to compel performance of the order disobeyed, a commission of sequestration, and in case the attachment had a return of non est inventus made to it, then giving the party suing it out the option of a commission of sequestration, or an order for the serjeant-at-arms, and such other process as he was formerly entitled to upon a return non est inventus made by commissioners named in a commission of rebellion issued for non-performance of a decree or order. See as to sequence of one writ after the other, O. XLII., r. 24.

Consolidated Orders, Order XXIX. Rule 3.

ORDER XLVIII.

WRIT OF POSSESSION.

Ord. 48.

1. A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the Superior Courts of Common Law.

[RULE I.]

Writ of possession to recover land.

The writ of possession was made returnable immediately after execution thereof (a), or on a day certain in term (b). The writ must, like all other writs of execution, have been conformable to the judgment, and therefore, if by default, it must describe the premises as they were described in the writ; if upon verdict, as they are found by the jury. The claimant was entitled to the writ, though his title had expired at the time of the trial, unless the defendant had shown he was not entitled (c).

Description of land recovered in writ of possession.

(a) *Doe d. Hudson v. Roe*, 18 Q. B. 806; 3 & 4 Wm. 4, c. 67, s. 2.

(b) R. G. H. 1858, Rule 72.

(c) *Gibbins v. Buckland*, 1 H. & C. 736.

RULES OF
COURT.**Ord. 48.**

[RULE I.]

How Court
regulates exe-
cution of such
writ.

The duty of the sheriff in executing such a writ is to deliver complete possession of every parcel, and for this purpose he may enter by force if necessary. If an undivided portion only is recovered, he is to put the claimant in possession of such portion only (*a*). The claimant, or some person on his behalf, must attend to receive possession and to point out the particular premises. If the claimant take more than he has recovered, the Court will on motion order him to restore it (*b*); so if the execution be set aside he will be ordered to restore possession (*c*). If, on the other hand the defendant, or perhaps any one else at his instance (*d*), forcibly re-enter, they will order him to vacate, or direct a fresh writ or writ of restitution to issue (*e*). In the last cited case a second writ of possession was granted, though re-entry was not made till some days after possession had been delivered; but it had formerly been held that no second writ could be granted after the first had been completely executed (*f*), whether that had been actually returned or not (*g*), nor can a writ of restitution issue for the defendant while the judgment for the claimant remains (*h*). Any order to restore possession should be directed to a party by name, otherwise no attachment can issue for disobedience to it (*i*); and no order would formerly be made upon a stranger to the action (*i*), unless perhaps in the cases above mentioned, but it is doubtful how far this last restriction would now hold.

[RULE II.]

Whereby judg-
ment party is
directed to de-
liver possession
of lands to an-
other, when
the party
prosecuting the
judgment en-
titled to writ.

2. Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment and that the same has not been obeyed.

Ord. 49.Writ of de-
livery as at
present in use
in actions of
detinue.

ORDER XLIX.

WRIT OF DELIVERY.

A writ for delivery of any property other than land or money may be issued and enforced in the manner heretofore in use in actions of detinue in the Superior Courts of Common Law.

- (*a*) Per Parke, B., in *Doe v. King*, 6 Ex. 793.
- (*b*) *Roe d. Saul v. Dawson*, 3 Wils. 49.
- (*c*) *Doe d. Stephens v. Lord*, 7 A. & E. 610.
- (*d*) See *Doe d. Thompson v. Mirehouse*, 2 D. P. C. 200.
- (*e*) *Doe d. Pitcher v. Roe*, 9 D. P. C. 971; *Doe d. Lloyd v. Roe*, 2 Dowl. N. S. 407.
- (*f*) See *Upton and Well's case*, 1 Leon. 145; Ca. ccii.
- (*g*) *Doe d. Pate v. Roe*, 1 Taun. 55.
- (*h*) *Doe d. Stephens v. Lord*, 7 A. & E. 610.
- (*i*) *Doe d. Lewis v. Ellis*, 9 D. P. C. 944.

ORDER L.

Ord. 50.

CHANGE OF PARTIES BY DEATH, &c.

[RULE I.]

1. An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title pendente lite.

Action not abated by marriage, death, or bankruptcy of party if cause of action continue, and not to become defective by assignment, creation, or devolution of estate.

By analogy to this rule a sole petitioner having died, Vice-Chancellor Hall ordered that his executors might carry on the petition (*a*). A suit was commenced before 1st November, 1875, one of the parties being an unmarried woman who married shortly after the commencement of the suit. Application was made by her through her next friend that the proceedings might be carried on against her husband. The Vice-Chancellor held that this was not an "action" within the interpretation clause of the Act of 1873, but held the applicant entitled to the order, saying at the same time that it need not be made on motion, application to the registrar being sufficient (*b*). A plaintiff had been required to deliver a statement of claim, but had failed to do so, and had become bankrupt. A motion to dismiss for want of prosecution was made, action not being abated. The Master of the Rolls directed notice of motion to be served on the trustees of the bankrupt, as he did not think it was the intention of the legislature to dispense with notice to the trustees (*c*).

In *Jackson v. North-Eastern Railway Co.* the plaintiff had entered into an arrangement with his creditors under which all his property had become vested in trustees, one of whom was a defendant in the suit, the other desired that the suit should be continued, but objected to incur risk. Defendants moved that all further proceedings might be stayed on the ground of plaintiff's cesser of interest. Malins, V.-C., refused the application, saying that one trustee being already a party, the other might, under r. 2, of this order have notice given him of continuance of the suit (*d*). On appeal the order was discharged; the Court holding that by the bankruptcy the plaintiff's interest was gone, and he was therefore not entitled to take any step in the cause. The trustee in liquidation might obtain an order of course to continue the suit (*e*).

[RULE II.]

2. In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof

In case of marriage, death, bankruptcy, or devolution of estate of party, Court or Judge may order successor in interest to be made party.

(a) *Re James Atkins*, 1 Ch. D. 82; 45 L. J. Ch. D. 117; 24 W. R. 39.

(b) *Darcy v. Whittaker*, W. N. 1876, 17; 33 L. T. N. S. 778; 24 W. R. 244.

(c) *Wright v. Swindon, Marlborough, and Andover Railway Co.*, 4 Ch. D. 164; 46 L. J. Ch. D. 199.

(d) W. N. 1877, 80.

(e) 5 Ch. D. 844; 46 L. J. Ch. D. 723; 36 L. T. N. S. 779; 25 W. R. 518.

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in such manner and form as herein-after prescribed, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the action as may be just.

The trustee of a bankrupt was allowed to defend an action on a bill of exchange, in which judgment had been suffered by default by the bankrupt, on the money being paid into Court, and a case being made out that the judgment had been snapped (*a*). In a suit by *cestuis que trusts* seeking to make trustees liable for losses to the trust estate by improper investment; one of the trustees had taken an active part in making the improper advance, the others having acquiesced. The personal representatives of the tenant for life, whose income had not been fully paid, and who had died pending the suit, asking to have the benefit of the decree as if they had been parties, their request was allowed (*b*). On this rule also see *Jackson v. North-Eastern Railway Co.* (*c*).

[RULE III.]

In case of assignment, &c., action may be continued.

3. In case of an assignment, creation, or devolution of any estate or title pendente lite, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

15 & 16 Vict.
c. 76, ss. 135,
140, 141.

By the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 141, the marriage of a woman, plaintiff or defendant, shall not cause the action to abate, but the action may notwithstanding be proceeded with to judgment; and such judgment may be executed against the wife alone, or by suggestion or writ of revivor pursuant to this Act, judgment may be obtained against the husband and wife and execution issue thereon, and in case of a judgment for the wife, execution may be issued thereon by the authority of the husband without any writ of revivor or suggestion; and if in any such action the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the Court.

Only in case action would have survived to representative.

At common law the death of a sole plaintiff or sole surviving plaintiff before judgment formerly abated the suit, but by the Common Law Procedure Act, 1852, s. 135, it is provided in such case that the action shall not abate, but the legal representative of the plaintiff may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed, and if such suggestion be made before trial, the truth of the suggestion shall be tried thereat together with the title of the deceased plaintiff; and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as if such person were originally the plaintiff. This clause has been held to apply only to cases where before the Act the cause of action would have survived to the representative; so in an action for personal injury by negligence no suggestion could be made (*d*). An original writ was delivered on the 6th August, 1873; leave to defend was given on the 23rd of the same month; plaintiff died the 24th May, 1874, before declaration; no step was taken till October, 1875, when a

(*a*) *Goddard v. Poole*, W. N. 1875, 230; 20 S. J. 98.

(*b*) *Stone v. Bennet*, W. N. 1876, 152.

(*c*) 5 Ch. D. 844; 36 L. T. N. S. 779; 25 W. R. 518.

(*d*) *Flinn v. Perkins*, 32 L. J. Q. B. 10.

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suggestion of his death was entered; on the 15th of November, 1875, a statement of claim was delivered. Application was made to set aside the proceedings, reference being made to the s. 58 of the Common Law Procedure Act, 1852, "that plaintiff shall be deemed out of Court unless he declare within one year after writ of summons is returnable." The Court on this ground set aside the proceedings, reversing the order of Quain, J., and supporting the registrar (a). It does not seem quite clear how this case should have been determined if it had been tried under the new practice; the rules to be referred to in such case would be rr. 1, 2, 5, and 6 of this order, as also O. XXI., r. 1, which see. It was also by the Act just mentioned, s. 140, enacted that "If the plaintiff in any action happen to die after an interlocutory, and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executor or administrator of such plaintiff," and the executor might proceed to judgment by writ of revivor. But it was held the executor could not, in an action for libel by the testator where special damage was not laid, proceed to final judgment (b). If the death happened before a writ of inquiry was executed, the writ of revivor must have been to show cause why the damages should not be assessed and recovered (c) if afterwards, why the damages assessed should not be recovered (d), and judgment was for the executor, not the original plaintiff (e). If the plaintiff, or indeed the defendant, either die after verdict and before judgment, the death could not be alleged for error, so as the judgment were entered within two months after verdict (f), and though the death happened before the verdict was actually given on the cause tried, if it were after the first day of the sittings (g), or on the commission day of the assizes (h), it was within the statute; for the sittings, or the assizes were but one day in law, but each sittings in term are distinct, and it is supposed that this will not now be so, as the sittings are to be continuous (i). This statute (k) was not confined to the case of actions whose cause survived to the executor, and therefore the executor might under it enter up judgment in an action for libel (l); and the entry was good if the judgment were signed, though the costs were not taxed (m), but to bring the statute into operation there must have been a verdict, a nonsuit was insufficient (n); but verdict entered up pursuant to leave reserved at the trial was within the statute, and if the party having the leave died before the motion could be made, it might be made by the executor (o). A verdict subject to a reference was also within the rule (p), and application might be made within two months after the award, to enter judgment *nunc pro tunc*. The judgment

Not in action of libel where no special damage laid. Form of writ of revivor, &c.

Death before verdict actually given.

Not confined to cases where action survived.

Verdict was necessary, nonsuit did not suffice.

(a) *Harper v. Peddie*, 33 L. T. N. S. 839; 20 S. J. 149; sub nom. *Harper v. Pedder*.

(b) *Ireland v. Champneys*, 4 Taunt. 884

(c) *Smith v. Harmon*, 1 Salk. 315.

(d) *Goldsworthy v. Southcott*, 1 Wils. 243; *Executors of Wright v. Nutt*, 1 T. R. 388.

(e) *Weston v. James*, 1 Salk. 42.

(f) 17 Ch. 2, c. 8, s. 1; 15 & 16 Vict. c. 76, s. 139, re-enacting former stat. of Ch. 2.

(g) *Jacobs v. Miniconi*, 7 T. R. 31; *Cheetham v. Sturtevant*, 1 D. & L. 631.

(h) *Anon.*, 1 Salk. 8; 7 T. R. 32 n.; *Plommer v. Webb*, 2 Raym. 1415 n.

(i) *Johnson v. Budge*, 3 Dowl. 207; *Taylor v. Harris*, 3 B. & P. 549.

(k) 17 Ch. 2, c. 8, s. 1, re-enacted by 15 & 16 Vict. c. 76, s. 139.

(l) *Palmer v. Cohen*, 2 B. & Ad. 966.

(m) *Fewins v. Lethbridge*, 4 H. & N. 418; 28 L. J. Ex. 243, sub nom. *Frewen v. Lethbridge*.

(n) *Dowbiggin v. Harrison*, 10 B. & C. 480.

(o) *Freeman v. Rosher*, 13 Q. B. 780.

(p) *Heathcote v. Wing*, 11 Ex. 355.

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15 & 16 Vict.
c. 76, s. 136.17 & 18 Vict.
c. 125, s. 92.15 & 16 Vict.
c. 76, ss. 135,
138.Proceeding in
case of death
of sole or sur-
viving de-
fendant.

in these cases was entered for the original plaintiff, but the executor must have sued out a writ of revivor or entered a suggestion to have execution (a). If the judgment were signed and execution issued on the day of the plaintiff's death they would be regular, as they relate to the first instant of the day when the plaintiff was still alive (b).

By the Common Law Procedure Act, 1852, s. 136: If there be two or more plaintiffs and one or more of them should die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, the action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs.

Where but for the Common Law Procedure Act, 1854, an action would have abated by reason of the death of either party, *e.g.*, in case of plaintiffs on the death of a sole plaintiff before verdict, or interlocutory judgment, and in which the proceedings might be revived and continued under that Act, the defendant or person against whom the action might be so continued might apply by summons to compel the plaintiff, or person entitled to proceed with the action in the room of the plaintiff, to proceed according to the provisions of the said Act within such time as the Judge should order, and in default of such proceeding, the defendant or other person against whom the action might be so continued as afore-said, was entitled to enter a suggestion of such default, and of the representative character of the person by or against whom the action might be proceeded with, as the case might be, and to have judgment for the costs of the action and suggestion against the plaintiff, or against the person entitled to proceed in his room, as the case might be, and in the latter case to be levied of the goods of the testator or intestate (c).

The death of a sole defendant before judgment was at common law an abatement of the action commenced against him, but this was amended by the 135th section of the Common Law Procedure Act, 1852, before mentioned, which applied equally to defendants as to plaintiffs. Leaving the course of practice in the different cases to be defined by the succeeding sections, of which the 138th was devoted to the case of the defendants, it went on to provide, "In case of the death of a sole defendant, or sole surviving defendant, where the action survives, the plaintiff may make a suggestion either in any of the pleadings, if the cause has not arrived at issue, or in a copy of the issue if it has so arrived, of the death, and that a person named therein is the executor or administrator of the deceased, and may thereupon serve such executor or administrator with a copy of the writ and suggestion, and with a notice signed by the plaintiff or his attorney, requiring such executor or administrator to appear within eight days after service of the notice, inclusive of the day of such service, and that in default of his so doing, the plaintiff may sign judgment against him as such executor or administrator; and the same proceeding may be had and taken in case of nonappearance after such notice, as upon a writ against such executor or administrator in respect of the cause for which the action was brought; and in case no pleadings have taken place before the death, the suggestion shall form part of the declaration (d), and the declaration and suggestion may be served together, and the new defendant shall plead thereto at the same time; and in case the plaintiff shall have declared, but the defendant shall not have pleaded before the death, the new defendant shall plead at the same time to the declaration and suggestion, and in case the defendant shall have pleaded before the death, the new defendant shall have liberty to plead to the suggestion only by

(a) *Earl v. Brown*, 1 Wils. 302.(b) *Wright v. Mills*, 4 H. & N. 488.

(c) 17 & 18 Vict. c. 125, s. 92.

(d) If the enactment be not virtually repealed, this must in future be read "statement."

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way of denial, or such plea as may be appropriate to and rendered necessary by his character of executor or administrator, unless by leave of the Court or a Judge he should be permitted to plead fresh matter in answer to the declaration; and in case the defendant shall have pleaded before the death, but the pleadings shall not have arrived at issue, the new defendant besides pleading to the suggestion shall continue the pleadings to issue in the same manner as the deceased might have done, and the pleadings upon the declaration and the pleadings upon the suggestion shall be tried together; and in case the plaintiff shall recover, he shall be entitled to the like judgment in respect of the debt or sum sought to be recovered, and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion and subsequent thereto, he shall be entitled to the like judgment as in an action originally commenced against the executor or administrator." The bankruptcy of a plaintiff in an action vested of course the interest of the bankrupt plaintiff in his assignees, or now his trustee, and by thus making a complete devolution of his interest, caused an imperfection in the suit, unless the bankrupt were a mere trustee, and suing as such, in which case his bankruptcy had no effect upon the suit.

Bankruptcy of plaintiff.

By the Common Law Procedure Act, 1852, s. 142, "The bankruptcy or insolvency of the plaintiff in any action which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action unless the assignees shall decline to continue and give security for the costs thereof upon a Judge's order, to be obtained for that purpose within such reasonable time as the Judge may order, but the proceedings may be stayed until such election is made, and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy." This only applies in cases where the bankruptcy occurs *pendente lite* (a), and though the section only in terms mentions bankruptcy, yet insolvency might be pleaded under the like circumstances (b), and the plaintiff confessing the plea was entitled to his costs (c). A plea of the bankruptcy of a sole plaintiff was an issuable plea (d); *secus* where the bankruptcy of one of several plaintiffs was pleaded (e); though in such case the plea was in bar (f), if the bankruptcy were before action brought.

15 & 16 Vict. c. 76, s. 142.

Bankruptcy and insolvency of plaintiff when not to abate action.

Extent of enactment.

The bankruptcy alone of a defendant formed no defence to an action, nor did it abate the suit; but by the 12th section of the Bankruptcy Act, 1869, it was enacted, that where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy, shall have any remedy against the property or person of the bankrupt in respect of such debt except in manner directed by this Act, and then follows an exception allowing secured creditors to realize their securities.

Bankruptcy alone formerly no bar or abatement.

Act of 1869, s. 12.

Formerly the fact of a plaintiff having proved his debt, which used to be an election on his part of the bankruptcy proceedings, could not be pleaded, but was a ground for a motion to the Court to stay proceedings in the action (g), and it was held that no suggestion of the plaintiff's proof in bankruptcy could be entered on the roll of the action (h); but it is

Formerly proof in bankruptcy no ground of the plea.

(a) *Stanton v. Collier*, 3 E. & B. 274.(b) *Swann v. Sutton*, 10 A. & E. 623; *Plummer v. Hedge*, 24 L. J. Q. B. 24.(c) *Plummer v. Hedge*, 24 L. J. Q. B. 24.(d) *Willis v. Allen*, 7 Scott, 474; 5 B. N. C. 465, sub nom. *Willis v. Hallett*.(e) *Staples v. Holdsworth*, 4 Bing. N. C. 144; 5 Scott, 432.(f) *Marlar v. Hartley*, 4 Doug. 22 n.(g) *Harley v. Greenwood*, 5 B. & A. 95.(h) *Sainter v. Ferguson*, 8 C. B. 619.

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15 & 16 Vict.
c. 86, s. 52.

In case of
abatement, &c.,
of suit order
may be made
which shall
have the same
effect as a bill
of revivor.

very doubtful whether, since the Act of 1869, a plea of the defendant's bankruptcy would not be a good plea under the section just mentioned, and our opinion is that if pleaded it would have been so held.

In Chancery, by 15 & 16 Vict. c. 86, s. 52, it was provided that "upon any suit in the said Court becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings, but an order to the effect of the usual order to revive, or of the usual supplemental decree may be obtained, as of course upon an allegation of the abatement of such suit or of the same having become defective, and of the change or transmission of interest or liability and an order so obtained when served upon the party or parties, who, according to the present practice of the said Court, would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the said Court, and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the clerks of records and writs within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him; provided that it shall be open to the party or parties so served within such time after service as shall be in that behalf prescribed by any general order of the Lord Chancellor to apply to the Court by motion or petition to discharge such order on any ground that would have been open to him on a bill of revivor or supplemental bill stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon; provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for such party, and such time shall have been elapsed thereafter as shall be prescribed by any general order of the Lord Chancellor in that behalf."

What proceedings could be revived under clause.

When revivor barred by laches.
Applied before or after decree.

This section was held to apply to suits commenced before the Act in which it was contained came into force (a), and even where the abatement occurred before the passing of the Act (a); a special case was held within it (b), and petitions also (c); so a reference for taxation of a solicitor's bill (d) might be revived. The party against whose representatives the suit is sought to be revived must have appeared, or the suit cannot be revived (e): as to Statute of Limitations with regard to right of revivor, see (f). When a decree for account has been made, the Court may refuse an order of revivor on the ground of laches, but will not do so unless the laches has been gross (g). This section was held to apply

(a) *Lowes v. Lowes*, 1 W. R. 14; comp. *Jones v. Woods*, 20 L. T. 50.

(b) *Wilson v. Whateley*, 1 J. & H. 331; comp. *Ainsworth v. Alman*, 14 Beav. 597; *Re Brown*, 29 Beav. 401.

(c) *Re Nicholson*, 29 Beav. 665; *Re Waugh*, *ib.*, 666; *Re Staggoll*, 15 W. R. 974.

(d) *Re Whalley*, 20 Beav. 576; *Re Nicholson*, 29 Beav. 665; *Re Waugh*, *ib.* 666; see *Robertson v. Southgate*, 7 Ha. 109; *Seton*, Decrees, 852.

(e) *Crowfoot v. Mander*, 9 Sim. 396; *Bland v. Davison*, 21 Beav. 312; *Williams v. Jackson*, 7 W. R. 104.

(f) *Bland v. Davison*, 21 Beav. 312; *Dunne v. Doyle*, 10 Ir. Ch. 502.

(g) *Alsop v. Bell*, 24 Beav. 451; *Higgins v. Shaw*, 2 Dr. & War. 356.

to abatement whether before or after decree (*a*). When the abatement was before decree, only the plaintiff could obtain the order, the defendants or representatives of a deceased defendant could only have an order that in default of revivor the bill might be dismissed (*b*). But a creditor who had proved his debt in a creditor's suit was held a plaintiff for the purpose of reviving (*c*), though the certificate allowing his debt was not signed (*d*). After decree any defendant interested had a right to revive if the plaintiff neglected to do so; but if he desired not only to revive but to take the conduct of the cause, he must have given notice of his motion (*e*). On abatement between hearing and decree judgment might be given without revivor (*f*), and where an issue was directed and the plaintiff died before it had been tried, but his death was not known when it was tried, the death was held no ground for a new issue. So a decree was allowed to be drawn up after an abatement since its pronouncement (*g*). In the case last undermentioned the Court issued a statement that it proceeded in the absence of a personal representative: see s. 44 of 15 & 16 Vict. c. 86.

No abatement was held to take place by the death of one plaintiff where he was only one of a class under s. 42 of the same Act (*h*), and where the plaintiff in an administration suit who was beneficially interested died, and the estate was known to be insolvent so that his representatives would take no benefit, an order for revivor was made dispensing conditionally with the presence of the plaintiff's representatives (*i*).

The following changes of interest were within the section, 1:—Where the interest of a party having appeared in the suit is transferred by operation of law, *e.g.*, on marriage of female plaintiff or defendant (*k*): in the first case cited a protecting order under 20 & 21 Vict. c. 85, had been obtained by a married woman on the ground of her husband's desertion, and thereafter she was made a defendant as a femme sole to a suit for the administration of the estate of a testator who had bequeathed her an interest in his property, the order was afterwards set aside at the instance of the husband, who denied the desertion, and thereupon the plaintiff in the suit applied for a supplemental order under this section to bring the husband into Court, which was held to be the proper order under the circumstances. Also on the death of a party and consequent transmission of his interest to his legal representative (*l*). Where the intestate was sole plaintiff in a supplemental suit a bill was held necessary (*m*). Where the party reviving the suit against executors sought not only to cure the abatement, but to get the benefit of accounts directed against the deceased and to continue them against his representative, an order might be made under the

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Who should apply.

What constituted an abatement.

Changes of interest within section.

(*a*) 10 Ha. App. lxxii, correcting *ibid.*, xxxi.

(*b*) Cons. Ord. XXXII., r. 4.

(*c*) *English v. Hayman*, 9 Ha. App. lxxxviii.; *Lowes v. Lowes*, 2 De G. M. & G. 784.

(*d*) *Inchley v. Alsop*, 9 W. R. 649.

(*e*) *Noble v. Stow*, 30 Beav. 512; *Stratford v. Baker*, W. N. 1867, 148.

(*f*) *Collinson v. Lister*, 20 Beav. 355; *Boucicault v. Delafield*, 12 W. R. 8; *Belsham v. Percival*, 8 Ha. 157.

(*g*) *Willimott v. Ogilby*, Seton, 1139; see *Rücker v. Scholefield*, 1 N. R. 180.

(*h*) *Hinde v. Morton*, 2 H. & M. 368, dissenting from *Hall v. Clive*, 20 Beav. 575; *Smith v. Horsfall*, 24 Beav. 331; *Ure v. Lord*, 2 Dr. & Sm. 263; 13 W. R. 41.

(*i*) *Leycester v. Norris*, 13 W. R. 201; see sect. 44, before mentioned.

(*k*) See *Rudge v. Weedon*, 4 De G. & J. 216, reversing *S. C.*, 7 W. R. 393; *Trezevant v. Broughton*, 5 W. R. 517; see *Powell v. Heather*, 1 L. T. N. S. 479.

(*l*) *Ward v. Shakeshaft*, 1 Dr. & Sm. 607; *Flockton v. Slee*, 7 W. R. 393; *Fane v. Richards*, 11 W. R. 524; see *Barber v. Walker*, 15 W. R. 728; *Joyce v. Rawlins*, 14 W. R. 785; but see *Wright v. Wilkin*, 11 W. R. 851.

(*m*) *Brooke v. Brooke*, 9 W. R. 804.

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[RULE III.]

Effect of Act of
1869 as to
change of
trustee of
bankrupt.Assignment for
benefit of
creditors.

Lunacy.

Foreign
curator.New party
coming *in esse*.Assignment not
being of sole
plaintiff's
entire interest.

section that the executors should admit assets, or in default that an account should be taken (*a*). But where the original bill was for specific performance, it was considered that a supplemental bill was proper against the executors of a deceased defendant (*b*).

So it was also on the bankruptcy of any party to the suit, bankruptcy being a transmission of the interest of the bankrupt by Act of the law, and a common order to revive against his assignees was obtainable (*c*), and on the bankruptcy being annulled the suit might be revived by a common order against the late bankrupt (*d*). No order was necessary on the change of the assignees of a bankrupt plaintiff under the Bankrupt Law Consolidation Act, 1849, s. 157 (*e*); but that Act is now repealed, and no clause seems to have been re-enacted in the Act of 1869 for this special purpose; but by s. 83, subs. 7, of that Act, it is provided that the trustee of a bankrupt may sue and be sued by the official name of "the trustee of the property of a bankrupt," and it would seem from this to be the intention that the change of the person should not abate any suit in which the person holding the same official name formerly was as such engaged.

Where a plaintiff assigned his property for the benefit of creditors, a common order to make the inspectors parties under the section was made, as it was held that such a transmission of interest was equivalent to a transmission by operation of law (*f*). So on lunacy of plaintiff, his committee might revive by a common order (*g*). But a suit could not be revived under this section against a curator in whom a plaintiff's estate was vested by the law of a foreign country (*h*).

(2.) Where a change in interest had taken place by a necessary party coming into existence pending the suit (*i*).

(3.) Where there had been an assignment of interest by a party, not being an assignment by the sole plaintiff of his entire interest, as on a devise by a defendant, in which case, under the old practice, a plaintiff might continue the suit by a supplemental bill, simply putting in issue the assignment. So in *Lowe v. Watson* (*k*), defendant in a creditor's suit died, being heir-at-law to the testator, devising the real estate to his son on trust to sell, and out of the proceeds to pay a legacy to his executors, the plaintiff was held entitled to the common order to revive against the devisee and executors of the heir-at-law under the statute; so on a settlement on the marriage of female plaintiff the trustees were made parties by the common order (*l*); so where a plaintiff trustee retired from the

(*a*) *Edwards v. Batley*, 19 Beav. 457; *Cartwright v. Shephard*, 20 Beav. 122; overruling *Dean and Chapter of Ely v. Edwards*, 22 L. J. Ch. 629.

(*b*) *Collard v. Roe*, 1 Gif. 311.

(*c*) *Macdonald v. Macfarlane*, 6 W. R. 245; *Lash v. Miller*, 4 De G. M. & G. 841; *Kitchin v. Himble*, 10 W. R. 686; *Jackson v. Riga Railway Co.*, 28 Beav. 75; *Cochrane v. Phillips*, 3 W. R. 461.

(*d*) *Mostyn v. Emmanuel*, 5 N. R. 464.

(*e*) *Gordon v. Jesson*, 16 Beav. 440; *Mann v. Ricketts*, 1 Ph. 617.

(*f*) *Crosskey v. European Steam Co.*, W. N. 1866, 23 & 70; see also *Overman v. Overman*, 12 Jur. N. S. 326.

(*g*) *Dangar v. Stewart*, 9 W. R. 266; *Timpson v. London & N. W. Railway Co.*, 11 W. R. 558.

(*h*) *Guillon v. Rotch*, 1 Dr. & Sm. 621.

(*i*) *Fullerton v. Martin*, 1 Drew. 238; *Phippen v. Brown*, 1 Jur. N. S. 698; *Pickford v. Brown*, 1 K. & J. 643; *Cresswell v. Bateman*, 6 W. R. 220; see *Jebb v. Tugwell*, 20 Beav. 461; comp. *Barrett v. White*, 3 W. R. 526; *Notley v. Palmer*, *ibid.*, 201; *Garrett v. Lancefield*, 11 W. R. 869. For form of order in case of infant, see Seton, 1166, Form 9.

(*k*) 1 Sm. & Gif. 123; see also *Hall v. Clive*, 20 Beav. 575.

(*l*) *Atkinson v. Parker*, 2 De G. M. & G. 221.

trust after decree, and new trustees were appointed, on further considerations the suit was revived on the motion of the continuing trustees, who were defendants, that they should carry on the suit as plaintiffs (a); so on a mortgage by any party to the suit, the mortgagee might be brought before the Court by the common order (b). But the common order might be refused where the revivor would alter the frame of the suit, *e.g.*, where it would place a co-plaintiff in a position that he ought to be a defendant (c), in which case a supplemental bill was held necessary; so where one of two creditors, plaintiffs in a creditor's administration suit, upon an abatement by the death of an executor of the testator, obtained letters of administration *de bonis non* to the testator's estate, it was held that the suit could not be revived against him under this section (d). Where, however, there was a sole plaintiff and sole defendant, and the defendant died, having appointed the plaintiff his executor, the latter was held entitled to revive the suit against the persons beneficially interested, who had been summoned to attend the proceeding in Chambers (e). The Court was in the habit of exercising its discretion in cases of this kind, and sometimes after decree or where the rights of parties had been ascertained, an order under the section was permitted, but the fact of a decree having been made was not of itself sufficient ground for the order (f); so where an administration bill was filed by the plaintiffs believing themselves to be next-of-kin of deceased, but after decree it turned out that another person was next-of-kin, it was held that the suits could not be continued, and the conduct of the cause given to the new plaintiffs without a fresh bill (g).

The result of the authorities on this section comes to this, that it applies to all cases of revivor in which a supplemental bill is not requisite (h).

It has been held generally not to apply to cases where the interest of a sole plaintiff has wholly determined by devise, assignment, &c., but the Courts have leant to extending it even to cases of this kind where it was possible. A supplemental bill was held necessary to revive a suit where the sole plaintiff died devising his whole interest, because the devisees' title was open to litigation in the Court of Chancery, so that he must establish it by bill in order to entitle him to the benefit of the former proceedings (i). So, where a sole plaintiff assigned his interest *inter vivos*, Wood, V.-C., remarked that the assignees' title might be litigated in that very suit, and that he must therefore file a bill in order to revive (k). In like manner, where the sole plaintiff's interest determined by death or otherwise, as the person succeeding would have an entirely new right of action, and the defendant might raise a new defence (l), the

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COURT.

Ord. 50.

[RULE III.]

Where form of
suit altered.

Where it did
not apply.
Where interest
of sole plaintiff
determined.

(a) *Williamson v. Jefferys*, 12 W. R. 403.

(b) *Brandon v. Brandon*, 3 N. R. 287; see *Freeman v. Pennington*, 3 De G. F. & J. 295.

(c) *Jervoise v. Clark*, 2 W. R. 337; comp. *Montefiore v. Guedalla*, 8 W. R. 53; *Foster v. Bonner*, 33 L. J. Ch. 384.

(d) *Tate v. Leithhead*, 9 Ha. App. li.; but see *Cresswell v. Bateman*, 6 W. R. 220.

(e) *Pedder v. Pedder*, 8 W. R. 15; but see *Dobson v. Faithwaite*, 10 W. R. 29.

(f) *Tate v. Leithhead*, 9 Ha. App. li.

(g) *Lawrence v. Maule*, 3 N. R. 239.

(h) *Heath v. Chapman*, 1 W. R. 344; *Heath v. Lewis*, 18 Beav. 527. See *Commerell v. Hall*, 2 Drew. 194.

(i) *Dendy v. Dendy*, 5 W. R. 221; *Williams v. Williams*, 9 W. R. 296; *Laurie v. Crush*, 32 Beav. 117.

(k) *Greenhalgh v. Rumney*, 5 N. R. 463.

(l) *Townd v. Toker*, 14 W. R. 300.

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Ord. 50.

[RULE III.]

Relaxation of
rule.Where proceed-
ings taken in
ignorance of
abatement.No revivor for
costs after
death.Nor for taxa-
tion of costs.

new plaintiff was put to his bill; so a bill was necessary where an ecclesiastical person succeeded to a benefice, or a remainderman became entitled on the death of a tenant for life in a settlement (a), but a remainderman coming in on the determination of an estate tail was held always within the section, because the plaintiff tenant in tail represented sufficiently the inheritance (b).

The older rule, however, has been relaxed and the common order has been made even in cases where the sole plaintiff's entire interest has determined, subject to the right of any one contesting the successor's title, to move for the discharge of the order (c). So a sole plaintiff having died before answer, his heir and executors were held entitled to revive, and the time for answering having expired, the Court ordered also that the defendant should within 28 days answer the interrogatories administered by deceased plaintiff (d). Where sole defendant's interest determined by his death, the common order was made against his devisee (e).

Where a supplemental bill is necessary it is sometimes a matter of some nicety who should be parties to it: see *Wilkinson v. Fowkes* (f).

Where some proceedings had been taken in ignorance of an abatement, an order might still be obtained directing that future proceedings should be carried on against the new parties (g).

Where defendant had appeared but not answered, and became bankrupt, an order to revive was made against his assignees without prejudice to their putting in an answer (h).

The Court might also in such cases bind the new parties by past proceedings (i), but would only do so where the new parties consented (k) to the order, or where, in the case of infants, the Court found it was for their benefit that they should be bound. If the common order were made in such a case, liberty was reserved to the new party to discharge it if objectionable (l).

Generally there was no revivor for costs after an abatement by death (m), whether that of the party to pay, or of the party to receive, the costs (n), nor was this rule affected by the fact that the defendants were a corporation (o), nor that the bill specially prayed costs (p), nor that the case occurred since 1 & 2 Vict. c. 110, s. 18, giving an order for costs, the effect of a judgment (p), nor that the party who had died without paying costs was one of several defendants (q). Where the party to whom costs were

(a) *Watts v. Watts*, Johns. 631; *Dobson v. Faithwaite*, 20 Beav. 228; *Wordsworth v. Parkins*, 12 W. R. 120.

(b) *Lloyd v. Johnes*, 9 Ves. 58. See *Stahle v. Winter*, 3 W. R. 580.

(c) *Eyre v. Brett*, 34 Beav. 441; *Colyer v. Colyer*, L. R. 1 Ch. 482; *Mallock v. Still*, 15 W. R. 293; *Hobson v. Shearwood*, 15 W. R. 887.

(d) *Earl Beauchamp v. Winn*, L. R. 2 Eq. 302.

(e) *Earl Durham v. Legard*, 34 Beav. 442; *Bedford v. Bedford*, cited in note thereto.

(f) 9 Ha. 193.

(g) See *Freeman v. Pennington*, 3 De G. F. & J. 295, overruling *Wilson v. Auchterloney*, 1 W. R. 34.

(h) *Kitchin v. Himble*, 10 W. R. 686. See *Earl Beauchamp v. Winn*, L. R. 2 Eq. 302.

(i) *Houston v. Briscoe*, 7 W. R. 394.

(k) *Ibid.*; *Smith v. Horsfall*, 24 Beav. 331.

(l) *Fenton v. Hawkins*, 4 N. R. 54.

(m) *Morgan v. Scudamore*, 2 Ves. Jr. 313; *Andrews v. Lockwood*, 15 Sim. 153; 2 Ph. 399.

(n) *Jupp v. Geering*, 5 Mad. 375.

(o) *Umpleby v. Waveney Valley Railway Co.*, 1 J. & H. 254.

(p) *Ibid.*; *Robertson v. Southgate*, 7 Ha. 109.

(q) *Bowyer v. Beamish*, 2 Jo. & Lat. 228.

payable died before taxation, the Court, no revivor being obtained, refused, with costs, a motion, that the master might proceed with the taxation (a). But the survivors of several defendants against whom a bill had been dismissed with costs, to be taxed and paid by the plaintiff, were entitled to proceed with the taxation of their costs, notwithstanding the death of one defendant, without a revivor, although the surviving defendants and the deceased in his lifetime had carried in for taxation a joint bill of costs (b),

But there are certain exceptions to the rule.

First, where the costs have been taxed before abatement, there may be a revivor for the purpose of payment merely (c), or if the taxation has been postponed on an undertaking that the delay shall be without prejudice (d).

Secondly, where costs are directed to be paid out of the estate (e) or any particular fund (f). But in *Malins v. Greenway* (g) a trustee who would have been entitled to his costs out of a fund in Court, dying before decree on further directions, was held to have no lien on the fund for his costs; but here the Vice-Chancellor held that the costs incurred, which were not mere trustee's costs, but were incurred separately from his co-trustee by a separate appearance in answer to specific charges against him, ought to have been provided for by his application at the hearing for the dismissal of that part of the bill against him with costs, and if that had been done there would have been no need for any more separate costs.

Thirdly, where an obligation imposed on the party liable for costs remains to be executed (h).

Fourthly, where costs are ordered to be paid by an officer of the Court, e.g., a receiver in the cause (i).

There may be now a revivor for costs after the bankruptcy of the party liable to pay them (k).

The common order to revive was obtained by motion or petition of course (l), nor did the allegation referred to in the section need proof (m); but where special circumstances arose out of the case, a special application was deemed necessary (n). If the order were obtained *ex parte*, it might of course be objected to by any party (o), and if obtained on a false statement of facts, would be discharged as irregular (p).

Service of the order should have been on the defendants personally;

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[RULE III.]

Exceptions.

Revivor for
costs after
bankruptcy.

Common and
special order to
revive.

Service of
order of re-
vivor.

(a) *Robertson v. Southgate*, 7 Ha. 109.

(b) *Hunter v. Daniel*, 7 Ha. 281; but see *Malins v. Greenway*, 7 Ha. 391; *Morgan & Davey on Costs*, 384; *Daniell*, 1396.

(c) *Lowten v. Mayor of Colchester*, 2 Mer. 113, overruling *Glenham v. Stutwell*, Dick. 14.

(d) *Tucker v. Wilkins*, 7 Sim. 349.

(e) *Jenour v. Jenour*, 10 Ves. 562.

(f) *Kemp v. Mackrell*, 2 Ves. Sr. 579.

(g) 7 Ha. 391.

(h) *Bowyer v. Beamish*, 2 J. & Lat. 240; *Morgan v. Scudamore*, 2 Ves. Jr. 313; *Johnson v. Peek*, 2 Ves. Sr. 465; *Kemp v. Mackrell*, 2 Ves. Sr. 579; see *Fitzmaurice v. Sadlier*, 12 Ir. Eq. 136.

(i) *Betagh v. Concanon*, Ll. & G. t. Plunket, 355.

(k) *Ellison v. Sharp*, L. R. 2 Ch. 355, following *Farrall v. Davenport*, L. R. 3 Eq. 473, and overruling *Boucicault v. Delafield*, 12 W. R. 1025; 13 W. R. 64.

(l) *Bonfil v. Purchas*, 1 W. R. 12.

(m) *Gordon v. Jesson*, 16 Beav. 440; *Martin v. Hadlow*, 9 Ha. App. lii.

(n) *Martin v. Hadlow*, 9 Ha. App. lii.; *Phippen v. Brown*, 1 Jur. N. S. 698; *Goodall v. Skerratt*, 1 Sm. & G. App. vii., and see *Noble v. Stow*, 30 Beav. 512.

(o) *Jackson v. Ward*, 1 Gif. 30.

(p) *Brignall v. Whitehead*, 30 Beav. 229.

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COURT.**Ord. 50.**

[RULE III.]

No appearance
needed to order
of revivor.Answer, &c.,
on revivor.

Form of order.

Consolidated
Orders, Order
XXXII., Rule 1.Time of appli-
cation to dis-
charge order
of revivor.New order
makes little
change.

but where a defendant was out of the jurisdiction, an order might be obtained to substitute service on his solicitor (a). So where defendants were very numerous, service on their solicitors in the original suit was ordered (b), but for leave to substitute service, application must be made to the Court. The bankruptcy of a defendant, after service of a subpoena to hear judgment, did not make a new subpoena necessary against his assignees, against whom the suit was revived (c). Where an estate was vested in trustees for sale, the Court held service on the trustees sufficient, without service on the parties beneficially interested in the purchase monies (d).

It has been held that it is unnecessary in any case to have an appearance entered to an order of revivor (e), but in *Hanbury v. Ward* (f), a different opinion seems to have prevailed, and in *Cross v. Thomas* (g), and *Foster v. Menzies* (h), leave was given to enter an appearance for a defendant who had not yet appeared.

Executors against whom an order had been obtained under this section, were held entitled to answer (i), and it seems interrogatories might be filed on such an order (k). A suit revived under this section was held anew suit so far as to entitle the defendant to move that the plaintiff, if resident out of the jurisdiction, should give security for costs (l).

For form of order under the section, see *Dean and Chapter of Ely v. Hensley* (m).

The O. XXXII. of the Consolidated Orders, r. 1, was made with reference to this enactment, and was as follows :

"Any person under no disability, or under the disability of coverture, who may be served with an order under the stat. 15 & 16 Vict. c. 86, s. 52, to revive any suit, or to carry on the proceedings therein, may apply to the Court to discharge such order within twelve days after such service ; and any person being under any disability other than coverture who may be so served, may apply to the Court to discharge such order within twelve days after the appointment of a guardian or guardians *ad litem* for such person ; and until such period of twelve days shall have expired, such order shall have no force or effect as against such last-mentioned person."

An application to discharge the order after six months had elapsed was refused with costs (n).

It will thus be seen that the new order, though somewhat wider in form and clearly requiring new rules of Court to define it, will leave the practice in its rationale very nearly as it was before ; but in substance the old rules in Chancery went very nearly as far as the new rule can justly go, and it can hardly be that the old practice will not be a useful guide under the new.

(a) *Foster v. Menzies*, 10 Ha. App. xxxvi. n. ; see *Scott v. Wheeler*, 13 Beav. 239 ; *Hart v. Tulk*, 6 Ha. 618 ; *Norton v. Hepworth*, 1 Mac. & Gord. 54.

(b) *Morritt v. Walton*, 2 W. R. 643.

(c) *Sparrow v. Ewing*, 14 W. R. 788.

(d) *Grimston v. Oxley*, 1 W. R. 100.

(e) *Hall v. Radcliffe*, 2 J. & H. 765 ; *Ward v. Cartwright*, 10 Ha. App. lxxiii.

(f) 18 Jur. 222.

(g) 16 Beav. 592 ; 10 Ha. App. xxxvi. n.

(h) 10 Ha. App. xxxvi. n.

(i) *Martin v. Purnell*, 3 W. R. 395.

(k) *Anon.*, 25 L. T. 61.

(l) *Jackson v. Davenport*, 29 Beav. 212.

(m) 1 W. R. 190 ; see also *Seton*, 1164.

(n) *Deeks v. Stanhope*, 1 Jur. N. S. 413.

It seems, of course, that in one important respect the procedure will be different, that abatement being absolutely abolished, revivor by the parties will be done away also, and more seems thrown on the Court and less on the parties by the new rules than by the old practice.

Notwithstanding this order, in a winding-up case where a creditor had filed a petition on the eve of the hearing, a third person bought his debt, and the petition was ordered to stand over for leave to amend. The amendment was made by the insertion of the purchaser's name as co-petitioner, and no fresh advertisements were issued. On the hearing the Vice-Chancellor made a winding-up order, which, however, the Court of Appeal overruled, refusing to give any encouragement to a proceeding so like maintenance (*a*). In general it would seem this rule is applicable in cases of petition as well as suits (*b*).

RULES OF
COURT.

Ord. 50.

[RULE III.]

4. Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties, may be obtained ex parte on application to the Court or a Judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.

[RULE IV.]

Where by devolution of interest pendente lite it becomes desirable that fresh party should be before Court, Court may make order accordingly.

Where an administration suit had been instituted by one trustee and executor of a will against his co-trustee and co-executor, an order was made that the plaintiff should pay certain moneys into Court, instead of doing which he absconded, and was removed from the trusteeship. Under this rule leave was given to one of the beneficiaries to attend the proceedings as plaintiff, and the former plaintiff was made defendant (*c*). A plaintiff having since commencement of action settled his account in the fund in question, an application was made that the action might be carried on between the parties on whom the settlement was made and the other parties to the action. The Master of the Rolls made the order, saying it could be obtained as an order of course (*d*). A sole plaintiff had become bankrupt; the discretion of the Court was sought by the defendant. The Master of the Rolls made a conditional order on the trustee of the bankrupt to proceed, or if he would not, then that the action should be dismissed (*e*).

(a) *Re Paris Skating Rink Co.*, 25 W. R. 701.

(b) *Re Atkin's Estate*, 1 Ch. D. 82; 45 L. J. Ch. D. 117; 24 W. R. 39; ante, p. 417.

(c) *Johnson v. Kershaw*, 20 S. J. 332.

(d) *Middleton v. Pollock*, W. N. 1876, 250.

(e) *Wright v. Swinden, Marlborough, and Andover Railway Co.*, 4 Ch. D. 164; 46 L. J. Ch. D. 199.

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Ord. 50.

[RULE IV.]

This rule gives no power to a judge to insert the name of a bankrupt's trustee in lieu of that of a plaintiff who has become bankrupt, and consequently in another case the old practice was followed that the trustee should give security for costs (*a*). Revivor in Chancery was formerly obtained on a side bar rule, but this rule raised a doubt whether it must not now be made by the Judge in Court. Vice-Chancellor Hall ordered suit to be revived in the old manner (*b*). With reference to this rule see also cases before cited, *Darcy v. Whittaker* (*c*) and *Goddard v. Poole* (*d*).

[RULE V.]

Service of such
order.

5. An order so obtained shall, unless the Court or Judge shall otherwise direct, be served upon the continuing party or parties to the action, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following Rules, be binding on the persons served therewith, and every person served therewith who is not already a party to the action shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons.

Person served
who is not
party to enter
appearance.

[RULE VI.]

Person so
served may
apply to dis-
charge within
twelve days
from service.

6. Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian ad litem in the action, shall be served with such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within twelve days from the service thereof.

[RULE VII.]

Person so
served being
under disa-
bility and not
represented,
may apply to
discharge
order, &c.

7. Where any person being under any disability, other than coverture, and not having had a guardian ad litem appointed in the action, is served with any such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within twelve days from the appointment of a guardian or guardians ad litem for such party, and until such period of twelve days shall have expired such order shall have no force or effect as against such last-mentioned person.

(*a*) *Anon.*, W. N. 1875, 202 ; 20 S. J. 57.

(*b*) *Roffey v. Miller*, W. N. 1875, 225 ; 24 W. R. 109 ; *Crane v. Loftus*, 24 W. R. 93.

(*c*) *Ante*, p. 417 ; W. N. 1876, 17 ; 33 L. T. N. S. 778 ; 24 W. R. 244.

(*d*) *Ante*, p. 418 ; W. N. 1875, 230 ; 20 S. J. 98.

The rules in this order seem intended to make provision for the fully carrying into effect the changes indicated in the Rules 1, 2, and 3 of the order. The rules in Chancery dealing with this matter formerly were 15 & 16 Vict. c. 86, ss. 52, 53, and Consolidated Orders, Order XXXII.; see s. 52 above cited, and Consolidated Orders XXXII., Rule 1.

RULES OF
COURT.

Ord. 50.

[RULE VII.]

ORDER LI.

TRANSFERS AND CONSOLIDATION.

Ord. 51.

1. Any action or actions may be transferred from one division to another of the High Court or from one Judge to another of the Chancery Division by an order of the Lord Chancellor, provided that no transfer shall be made from or to any division without the consent of the President of the Division.

[RULE I.]

Actions may be transferred from one division to another, and from one Judge to another in Chancery Division.

Only the Lord Chancellor can make the order in the Chancery Division; the Court of Appeal has no such jurisdiction (*a*). It seems that consent of the primary judges is not now necessary (*b*). The rule is the same with respect to a statutory petition (*c*). The Lord Chancellor, on a written application to his secretary, accompanied by the written consent of all parties, will direct transfer. Where the parties do not consent, the application must be made in Court (*d*). It has been held that a transfer of an action could not be ordered on the grounds that the action had already been brought in one Division, discontinued, and was afterwards sought to be brought on again in another Division to avoid the payment of costs. The proper course in such case is to apply to the Judge to whose Court the cause is annexed to stay it until the costs of the discontinued action be paid (*e*). Application by the defendants to transfer an action for collision to the Admiralty Division was refused, as the collision was in the river, and no question of complicity was involved (*f*).

The following new rule has been introduced by the Rules of the Supreme Court, June, 1877:—

1A. In the Chancery Division a transfer of a cause from one Judge to another may by the same or a separate Order be ordered to be made or to be deemed to have been made for the purpose only of trial or of hearing, and in such case the original and any further hearing shall take place before the Judge to whom the cause shall be so transferred; but all other proceedings therein, whether before or after the hearing or trial of the cause, shall be taken and prosecuted in

[RULE 1A.]

Actions may be transferred for purpose only of trial or hearing.

(*a*) *Re Hutley*, 1 Ch. D. 11; 45 L. J. Ch. D. 79; 33 L. T. N. S. 337.

(*b*) See 20 S. J. 4.

(*c*) *Re Boyd's Trusts*, 1 Ch. D. 12.

(*d*) Memorandum, 1 Ch. D. 41; 24 W. R. 19.

(*e*) *Cannot v. Morgan*, 1 Ch. D. 1; 45 L. J. Ch. D. 50; 33 L. T. N. S. 402; 24 W. R. 91.

(*f*) *General Steam Navigation Co. v. London and Edinburgh Shipping Co.*, W. N. 1876, 56; 20 S. J. 282.

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COURT.**Ord. 51.**

[RULE I A.]

the same manner as if such cause had not been transferred from the Judge to whom it was assigned at the time of transfer, and as if such Judge had made the decree or judgment, if any, made therein, unless the Judge to whom the cause is transferred shall direct that any further proceedings therein before or after the hearing or trial thereof, shall be taken and prosecuted before himself or before an official or special referee.

This rule was introduced to meet the inconvenience arising from the want of chambers annexed to the Court of Mr. Justice Fry.

[RULE II.]

Action at any stage may be transferred from one division to another by order of Court or Judge of Division to which action is assigned, &c.

2. Any action may, at any stage, be transferred from one division to another by an order made by the Court or any Judge of the Division to which the action is assigned: Provided that no such transfer shall be made without the consent of the President of the Division to which the action is proposed to be transferred.

In an action on an agreement to take a house, arising, as it was said, out of matters in an administration suit, an application to transfer the action to the Chancery Division to have it heard with the suit was refused by the Judge, who said the Lord Chancellor alone could give permission (*a*). It was held by the Master of the Rolls that the consent of the President of the Division to which the case is transferred, is not a condition precedent to the order for transfer, but may be obtained after order (*b*). A Judge at Chambers, not of the Exchequer Division, it was held, was unable to make an order transferring cause to Common Pleas Division, which had been tried before Pollock, B., at Liverpool, on an issue out of Common Pleas of Lancaster, and in which a rule nisi had been granted in the Exchequer Division (*c*). But it has since been held that under this rule, together with **O. LIV., r. 2**, a Judge at Chambers of any Common Law Division has jurisdiction to transfer cause from any such division, though not his own, to the Chancery Division (*d*). The Master of the Rolls had directed transfer of an action for an appointment of a receiver and administrator pending probate suit, and for injunction to prevent persons intermeddling with assets. On application to the president of the Probate Division for his assent, he gave it, saying it would be very prejudicial if, after one Judge had arrived at the conclusion that a transfer was desirable, another should throw difficulty in the way, and directed the assignment of the action to himself under **r. 3** (*e*). An action was instituted in the Exchequer Division for breach of agreement and fraudulent misrepresentation of the value of a business, and a cross action in the Chancery Division for specific performance of an agreement; after issue joined in both actions;

(*a*) *Anon.*, 20 S. J. 32.

(*b*) *Humphreys v. Edwards*, 45 L. J. Ch. D. 112; W. N. 1875, 208.

(*c*) *Anon.*, 20 S. J. 57.

(*d*) *Hillman v. Mayhew*, 1 Ex. D. 132; 45 L. J. Ex. D. 334; 34 L. T. N. S. 256; 24 W. R. 435; see also **s. 11** of Act 1875; per Mellish, L. J., in *Maclean v. Vaughan*, 20 S. J. 723; *Holloway v. York*, 2 Ex. D. 333; 25 W. R. 463; 21 S. J. 360.

(*e*) *Barr v. Barr*, W. N. 1876, 44; 20 S. J. 272.

an application was made to a Judge in Chambers for the transfer of the action in the Exchequer Division to the Chancery Division; this application was refused, as the Judge thought a jury ought to try the case. Held on appeal that this was no good ground for refusal, and that the order ought to have been made, as the Chancery Division has, *primâ facie*, exclusive jurisdiction in specific performance; see Act 1873, s. 34 (a). On this rule also, see *Debenham v. Lacey* (b).

RULES OF
COURT.

Ord. 51.

[RULE II.]

The following rule has been here introduced by the Rules of the Supreme Court, June, 1876:—

2A. When an order has been made by any Judge of the Chancery Division for the winding up of any company under the Companies Acts, 1862 and 1869, or for the administration of the assets of any testator or intestate, the Judge in whose Court such winding up or administration shall be pending shall have power, without any further consent, to order the transfer to such Judge of any action pending in any other division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered, as the case may be.

[RULE II.A.]

Where an order in Chancery division for winding up a company, &c., has been made, the Judge has power to order transfer of any action pending in other division brought by or against such company, &c.

It is open to some doubt whether a motion under this rule should be on notice or *ex parte*, but it has been allowed *ex parte* (c).

3. Any action transferred to the Chancery Division or the Probate Division, shall, by the order directing the transfer, be directed to be assigned to one of the Judges of such Division to be named in the order.

[RULE III.]

Transfer to Chancery or Probate Divisions to be to particular Judge.

With reference to this rule, see *Barr v. Barr* before cited (d).

4. Actions in any Division or Divisions may be consolidated by order of the Court or a Judge in the manner heretofore in use in the Superior Courts of Common Law.

[RULE IV.]

Actions may be consolidated as heretofore in use at Common Law.

When several actions are brought by the same plaintiff against several defendants, and the questions in dispute and the evidence to be adduced are the same in all, the plaintiff will, though there is no joint liability, be put to his election in which one he will proceed, and proceedings in the rest will be stayed on the defendants in the other actions submitting to be

(a) *Holmes v. Harvey*, W. N. 1876, 276; 35 L. T. N. S. 600; 25 W. R. 80.

(b) *Post*, p. 435; 24 W. R. 900; 20 S. J. 703; see *Holloway v. York*, 2 Ex. D. 333; 21 S. J. 360; 25 W. R. 403.

(c) *Field v. Field*, W. N. 1877, 98; *Whitaker v. Robinson*, W. N. 1877, 201.

(d) *Ante*, p. 432; W. N. 1876, 44; 20 S. J. 272.

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[RULE IV.]

Not confined to insurance cases nor to actions on same instrument.

Questions and evidence must be the same.

Refused where plaintiffs are different.

Defendants undertake to abide by verdict if Judge satisfied.

bound by the verdict in the one tried. This practice, which seems originally to have been introduced by Lord Mansfield in actions against underwriters in insurance cases (*a*), is not adopted on the ground that the actions are vexatious, but simply to save useless expenditure (*b*), and as the Courts consider that the plaintiff is protected from all injury by the undertaking of the defendants, the order was made even where he refused his consent (*c*).

This stay of proceedings, or consolidation of actions as it is called, is not confined to insurance cases, though commoner in them than in others (*d*), nor to actions on the same instrument; thus where five actions were brought, on five separate guarantees for £50 each to insure payment to a bank of £250 due from one, the proceedings were stayed in all but one (*e*). Where necessary, the actions will be divided into classes, and all but one in each class stayed (*f*). In ejectment, where the title is the same, several actions will be consolidated (*g*).

But unless the questions in the several actions and the evidence are the same, no such order will be made. Thus where actions were brought against the owners of different vessels for tolls and port and other dues, a consolidation rule was refused, as the tolls, &c., became due on different occasions, and though the right of the plaintiffs to tolls might be in question in all, the defences in other respects might be different in every one of the actions (*h*); it has been continually refused against provisional committeemen (*i*). Nor will the Courts stay proceedings where the plaintiffs in the several actions are different, but the defendants the same. Thus they have refused to do so where five actions of trover were brought by different plaintiffs against the same defendant, it being sworn that the causes of action were different (*k*), and where eight actions were brought against a steam navigation company by different plaintiffs for breaches of separate contract to carry them, the Court refused even a rule nisi, though the defendants offered in the event of a verdict being given against them in one action to submit to an inquiry of damages in the others (*l*); and in actions by a vicar against landowner, and by landowners against the vicar to try the right to a modus, the Court refused to order the latter actions to abide the event of the action by the vicar (*m*).

The application, which should have been formerly to a Judge at chambers upon a summons entitled in all the actions (*n*), and served upon the attorney in each (*o*), may be made as soon as the defendants have appeared, (*p*). By the order, the defendants undertake to be bound by the verdict found in the action tried, if the same shall be to the satisfaction of the Judge who tries it (*q*), and such other terms are imposed on

(*a*) Tidd, 614, 9th ed.

(*b*) Per Erskine, J., in *Sharp v. Lethbridge*, 4 Man. & Gr. 37-40.

(*c*) *Hollingsworth v. Brodrick*, 4 A. & E. 646; *Sharp v. Lethbridge*, 4 Man. & Gr. 37-40.

(*d*) See *Anderson v. Towgood*, 1 Q. B. 245; *Bartlett v. Bartlett*, 4 Sc. N. R. 779; *Lewis v. Barks*, 4 C. B. N. S. 330.

(*e*) *Sharp v. Lethbridge*, 4 Man. & Gr. 37.

(*f*) *Syers v. Pickersgill*, 27 L. J. Ex. 5.

(*g*) *Grimston v. Grimston*, Cooke C. P. 3rd Ed. 179.

(*h*) *Corporation of Saltash v. Jackman*, 1 D. & L. 851.

(*i*) *Giles v. Tooth*, 3 C. B. 665; *Newton v. Belcher*, 9 Q. B. 612; and see *Henry v. Nash*, 1 Ex. 826.

(*k*) *Nicholls v. Lefevre*, 3 D. P. C. 135.

(*l*) *Westbrook v. Australian St. Nav. Co.*, 14 C. B. 113.

(*m*) *Ward v. Pomfret*, 1 Man. & Gr. 559.

(*n*) *Ward v. Pomfret*, ante.

(*o*) *Anderson v. Boynton*, 13 Q. B. 313.

(*p*) *Hollingsworth v. Brodrick*, 4 A. & E. 646.

(*q*) See 4 A. & E. 649 n. (*a*), for form in insurance cases.

them, as the particular case call for (a), but no order will be made that the plaintiff shall be bound by the verdict (b); and notwithstanding the order, he may after a verdict against him in one action proceed with any of the others, although the costs in the first are unpaid (c), though it is said that if he do so without the leave of the Court, he loses the benefit of any terms imposed on the defendants by the consolidation rule (d). Before verdict of course he cannot proceed, and where after a consolidation rule the plaintiff discontinued the action, which was stayed, and brought another against the same defendant in another Court, that Court stayed the proceedings until after the trial of the cause ordered by the consolidation rule to be tried (e). The defendants, on the other hand, are bound by the order unless the rule is opened by the Court, which it will not be in any case where a new trial would not be granted (f). They are, however, only bound by a verdict which stands (g), and are not precluded from bringing error (h).

It would seem that when actions are consolidated, all the defendants are liable to the plaintiff for the costs of the action that is tried, that they stand to one another in the relation of joint defendants, so as to be liable to contribution for these costs, and that at least, where the same attorney was originally retained by all, they are liable jointly to him (i).

Under r. 4, a motion was made that three suits might be consolidated, or the trials might be ordered to come on together. The defendant in No. 1, Lacy, was a contractor, who had agreed to execute certain building work for the plaintiff, and had received part of the money due on the contract. A large part of the work had been executed by sub-contractors, who claimed part of the balance due from Debenham to Lacy, under the original contract and actions. Nos. 2 and 3 were commenced in the Common Pleas and Exchequer Divisions, against Debenham and his architect, to enforce these claims, and certain alleged claims against the architect arising out of these transactions. No. 1 was instituted in Chancery by Debenham and his architect against Lacy, the sub-contractors, and other persons claiming part of the balance in Debenham's hands, in order to ascertain who was in fact entitled to such balance. Pollock, B., had made order in No. 3 that the action should be transferred to the Chancery Division, subject to the consent of the president. Plaintiff in No. 2 objected that one of the issues in that action was entirely foreign to those in No. 1, and that they ought not to be consolidated. Plaintiff in No. 3 submitted that no order for consolidation was necessary. The Vice-Chancellor said that the plaintiff in No. 2 seemed to have a claim against the defendant in No. 2 entirely distinct from the issues in No. 1, and he thought the best plan would be for all the actions to come on together, and let the evidence be used in all. The proper order would be that the plaintiff in No. 2, undertaking forthwith to give notice to the defendant in No. 2 to plead in No. 2, any evidence given in No. 1 or 2 might be used in No. 3. As to the last action, he directed all further proceedings to be stayed, except so far as might be necessary to bring it on for trial with the other two actions, and made one order in all the actions,

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[RULE IV.]

No order will be made that plaintiff shall submit to verdict.

If plaintiff proceed after order against him.

Costs in consolidated actions.

Debenham v. Lacey.

(a) *Lewis v. Barkes*, 4 C. B. N. S. 330, form where actions were on mutual insurance policies; see also *Syers v. Pickersgill*, 27 L. J. Ex. 5.

(b) *M'Gregor v. Horsfall*, 3 M. & W. 320.

(c) *Doyle v. Douglas*, 4 B. & Ad. 544; *Doyle v. Anderson*, 1 A. & E. 635.

(d) *Long v. Douglas*, 4 B. & Ad. 545, n. (a).

(e) *Parkin v. Scott*, 1 Taunt. 565.

(f) *Foster v. Alvez*, 3 Bing. N. C. 896.

(g) *Hodson v. Richardson*, 3 Bur. 1477.

(h) *Aylwin v. Favine*, 2 B. & P. N. R. 430; *Gill v. Hinckley*, 1 Moo. 79.

(i) *Anderson v. Boynton*, 13 Q. B. 308.

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[RULE IV.]

*Concha v.
Murietta.*

costs to be costs in the causes (a). A foreigner, owner of a large number of bonds of a foreign government, which were in the hands of his agent in England, gave a power of attorney to his brother to receive them, and they were accordingly delivered to the brother. He afterwards deposited them in his own name with various firms in England, and when the owner demanded their delivery, refused it, claiming to be entitled to them on his own behalf. The owner filed three bills in Chancery against the different holders of the bonds, and the brother filed a cross bill to assert his alleged right; pending the suits both brothers died. The suits were revived by their respective representatives, and a new suit was instituted by the executors of the original plaintiff for administration of his estate, in which decree was made. Bacon, V.-C., afterwards made an order in all the suits staying further proceedings, except in the administration suit, with liberty to any of the parties to apply in that suit, to add to the decree therein all accounts and inquiries necessary to determine all questions in the other suits. This order not being by consent, the Court of Appeal held there was no right to make it, as the parties had a right to carry on their original litigation in the ordinary way, but ordered that the original suits and the cross suits should be consolidated *inter se*, though not with the administration suit (b).

*Amos v.
Chadwick.*

A motion was made by plaintiffs in seventy-eight distinct actions, brought by persons who were severally shareholders in a company, against the same defendants, the promoters claiming relief on the ground that they had been induced to take shares in the company by misrepresentations in the prospectus. The motion asked that the actions might be consolidated, or that time might be allowed in all but two, to take the next step until those two had been tried. In one of the actions the statement of defence had been put in, in another the statement of claim, and in all the others the writ only had been issued, and summonses were pending in Chambers to dismiss them for want of prosecution. The Vice-Chancellor held that though under the old Common Law practice he could only consolidate at the instance of the defendants, he could, under the general practice now existing, allow time for taking the next step in the actions, and he made an order accordingly on the undertaking by the plaintiffs to try the selected actions, to take them as two test actions against the defendants, to dismiss the remaining actions if they failed in them, and to allow the evidence in the selected actions to be made evidence in the others (c).

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ORDER LII.

INTERLOCUTORY ORDERS AS TO MANDAMUS INJUNCTIONS
OR INTERIM PRESERVATION OF PROPERTY, &c.

[RULE I.]

Court or Judge
may make order
for interim cus-
tody of subject-
matter of liti-
gation or order
amount in dis-
pute to be
brought into
Court, &c.

1. When by any contract a *primâ facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.

(a) *Debenham v. Lacey*; *Smith v. Whichcord*; *Evans v. Debenham*, 24 W. R. 900; 20 S. J. 703.

(b) *Concha v. Murietta*, 21 S. J. 296.

(c) *Amos v. Chadwick*, 4 Ch. D. 869.

The power given by this rule to the several divisions of the High Court seems to have existed at all times in the old Court of Chancery, but was one of not very ordinary exertion (*a*); but the power in Chancery was not, it seems, limited to the case of *prima facie* liability on a contract.

Provision is made for the practice under this rule by r. 5 of this order. Most of the rules in this order have reference to Act of 1873, s. 25, subs. 8.

In an action for the specific performance of an agreement by defendant to take the lease of a farm, verdict was given for plaintiff, but judgment for defendant; whereupon the plaintiff gave notice of appeal, and upon a motion being made by plaintiff for a receiver and manager of the farm, the Court appointed the plaintiff receiver and manager without security, upon his undertaking to abide by any order the Court might make (*b*). When an interlocutory order is made under this rule for payment of money into Court, it may be enforced by attachment if the person against whom it is made be within any of the exceptions in s. 4 of the Debtors Act, 1869 (*c*).

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[RULE I.]

2. It shall be lawful for the Court or a Judge, on the application of any party to any action, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as to the Court or Judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.

[RULE II.]

May order interim sale of perishable articles.

This may be a most useful power, which, without consent of parties, could not before have been exercised. The mode of exercising it is provided for by r. 4 of this order. See Act of 1873, s. 25, subs. 8.

In an *anon.* case a horse was sold, part of the purchase being another horse, with warranty; and unsoundness of this horse being alleged, the plaintiff applied for leave to sell it; the application was refused, as, on his own allegation, he might sell it without an order (*d*).

3. It shall be lawful for the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject of such action, and for all or any of the purposes aforesaid to authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

[RULE III.]

May make orders for detention, preservation, or inspection of subject-matter and authorise entry or taking of samples, or making of experiments.

(*a*) Daniell Ch. Pr. 1627.

(*b*) *Hyde v. Warden*, 1 Ex. D. 309; 20 S. J. 782.

(*c*) *Hutchinson v. Hartmont*, W. N. 1877, 29.

(*d*) *Anon.*, 20 S. J. 100.

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[RULE III.]

17 & 18 Vict.
c. 125, s. 58.Application
might be made
at any time.Costs in discre-
tion of Court.15 & 16 Vict.
c. 83, s. 42.Might be ex-
ercised even
before declara-
tion.

How supported.

Court of Chan-
cery had power
to do all in this
order, but
would only
make such
orders where
no order, less
infringing
liberty of de-
fendant would
be available.Court refused
order on plain-
tiff to produce
specimen.

See Act of 1873, s. 25, subs. 8.

The powers given by this rule also seem to be new on the whole, though as to one of them, viz., the inspection of property, the Common Law Procedure Act, 1854, s. 58, provided that "either party shall be at liberty to apply to the Court or a Judge for a rule or order for the inspection by the jury or by himself or his witnesses of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the Court or a Judge, if they or he think fit, to make such rule or order upon such terms as to costs or otherwise, as such Court or Judge may direct."

It seems under this rule the application might be made at any time upon a proper case being made out, and the Court or Judge had power to direct any such things to be done as might be necessary to the inspection; so in an action for an encroachment on the plaintiff's mine, the defendant was ordered to allow him to make a drift-way through a wall at the end of the defendant's mine, on giving security to the satisfaction of the master for indemnifying the defendant for any damage done by the inspection (a). The costs were in the discretion of the Court or Judge making the order; if no order were made as to them, they did not become costs in the cause (b).

By the Act 15 & 16 Vict. c. 83, s. 42, the Patent Law Amendment Act, a power was given to the Common Law Courts to make orders in actions for the infringement of patents for an injunction, inspection, and account; but this power was generally exercised and exercisable by the Court of Chancery before that Act (c). It might have been exercised even before declaration (d). The application was to be by the very terms of the section, to the Court if it were sitting, to a Judge if it were not, but if made by a plaintiff should have been supported by an affidavit showing that the thing did really exist, and that there was at least reasonable ground for believing it was an infringement, and that inspection was necessary for the purpose of the cause (e), and should also show the nature of the patent, that the Court might judge of the necessity for inspection (f).

There was no doubt that the Court of Chancery would, on a proper case, have ordered samples to be given even for purpose of analysis (g) and machinery to be put in motion (h), but it would only have ordered inspection when no order less infringing on the defendant's liberty would be sufficient for the purpose; so in a suit for infringement of a patent for a sewing machine, the Court before decree refused to give the plaintiff inspection of all the defendant's stock, but ordered the defendant to verify by affidavit all the different kinds of sewing machines which he had sold since the last disclaimer entered by the plaintiff, and to produce one of each sort for inspection (i).

The Act provides for application by defendants as well as plaintiffs. In a case before the Act the Court refused to order the plaintiff to produce a specimen on the ground that that would have been compelling him to

(a) *Bennett v. Griffiths*, 30 L. J. Q. B. 98.(b) *Smith v. Great W. Railway Co.*, 6 E. & B. 405.(c) *Holland v. Fox*, 3 E. & B. 983; *Patent Type Founding Co. v. Lloyd*, 5 H. & N. 199.(d) *Amies v. Kelsey*, Bail. Ct. Ca. L. & M. 123; 22 L. J. Q. B. 84.(e) *Id.*; *Shaw v. Bank of England*, 22 L. J. Ex. 26; *Patent Type Founding Co. v. Lloyd*, 5 H. & N. 192.(f) *Meadows v. Kirkman*, 29 L. J. Ex. 205.(g) *Patent Type Founding Co. v. Walter, Johns*, 727.(h) *Russell v. Cowley*, 1 Webst. Pat. Ca. 459; *Beardsell v. Schwann*, Seton, 910.(i) *Singer Manufacturing Co. v. Wilson*, 13 W. R. 560.

disclose his own evidence (a), but it would seem that if this was a good objection before the Act, there is nothing after the Act invalidating such an objection. It gives the Courts of Common Law certain powers, but in nowise prescribes in what cases the powers are to be used, and certainly does not prescribe that they shall be used where they ought not on general principles of jurisprudence.

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[RULE III.]

Semble as to
this, law not
altered.

New rule wider.

The new rule, however, is much wider than any of the old ones, which have been noticed, to show how the Courts dealt with similar powers, and as a guide to the manner in which the Judges are likely to act with the powers now committed to them.

The mode in which the powers under this rule are to be called into action is given in the next rule.

In *Nicholas v. Dracachis*, deceased having died as was supposed intestate, administration had been granted to the defendant, in whose name certain shares in ships were registered, late the property of the deceased. A will having been found, the plaintiff, a legatee, took out a citation to the defendant to bring in the letters of administration, and moved for an order restraining any person from dealing with the shares or from paying over or receiving the profits thereof; the order was made (b). An injunction was granted *ex parte* to restrain the defendant from pulling down a house which he alleged was not built according to contract (c). But under this rule Quain, J., held that an order for receiver could not be made *ex parte* (d). But it was held in *Hennessy v. Bohmann*, that an order may in general be made *ex parte* under this rule (e); see also *Sutton v. The Barnet Local Board* on this rule (f); *Hyde v. Warden* (g); but not, on *ex parte* application, for inspection (h). In an action for trespass by mine owners against neighbouring mine owners, an order was obtained under this rule for the inspection of the defendants' mine (i). In the case of *Pease v. Fletcher* (k), an order was made for a receiver where the plaintiffs were legal mortgagees as to part of the mortgaged estates and equitable mortgagees of the residue. In an action for the obstruction of light and air an application was made by the defendant on appeal from the master for inspection of the plaintiff's premises. No statement of defence had then been delivered. The Judge held that he must wait and see whether the defence was that there was no obstruction or that the plaintiff had no ancient lights, before he could grant it (l). An action was brought for revivor of probate. Proceedings had been instituted in Chancery to set aside a devise in testator's will, which had failed, and the bank where most of the assets had been deposited had given notice to the plaintiff of their intention to give up the property to the defendant within a week, unless restrained by competent authority. The defendant had been served with a writ in the action. Notice of an application by plaintiff for administration pendente lite had been drawn up, but defendant's solicitor had declined to accept service of the notice. A motion for *ex parte* injunction against the bank to restrain them from parting with the property pending the suit was

(a) *Crofts v. Peash*, 2 Hodg. 110; 1 Webst. Pat. Ca. 268.

(b) 1 P. D. 72; 45 L. J. P. D. A. 45; 24 W. R. 461.

(c) *Drake's Patent Concrete Co. v. Dower*, W. N. 1875, 230; 20 S. J. 98.

(d) *Haberson v. Gill*, W. N. 1875, 231; 20 S. J. 98.

(e) W. N. 1877, 14; 36 L. T. N. S. 51.

(f) 20 S. J. 829.

(g) 1 Ex. D. 309; 20 S. J. 782, and *Velati & Co. v. Braham & Co.*, 46 L. J. C. P. D. 415.

(h) *Anon.*, 20 S. J. 101.

(i) *Cooper v. The Ince Hall Co.*, W. N. 1876, 24; 20 S. J. 241.

(k) 1 Ch. D. 273; 45 L. J. Ch. D. 265; 33 L. T. N. S. 644; 24 W. R. 158.

(l) *Anon.*, W. N. 1876, 53; 20 S. J. 282.

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[RULE III.]
—

granted (a). In an action to restrain the infringement of a patent, Vice-Chancellor Bacon had made an order that the plaintiffs should be at liberty to inspect the defendants' process of manufacture. The defendants appealed, and the operation of the order was pending during the appeal: the defendants objected to the order, denying the validity of the plaintiffs' patent, and alleging that it did not extend to the process which the plaintiffs admitted was used by the defendants, and urging that their trade secrets should not be disclosed to the plaintiffs, who, until these matters were determined, were rival traders. It was suggested that the Court should, under **O. XXXI., r. 19**, order these questions to be tried before deciding on the right of inspection. Ultimately, in place of the Vice-Chancellor's order, an order was made that the inspection should be made by two skilled witnesses (one to be nominated on each side), approved by the Court and for the purpose of informing the Court, who should give evidence at the hearing, and were to be considered as bound in honour not to disclose any trade secrets of the defendants' which might come to their knowledge. Each party was also to be at liberty to nominate one person to accompany the inspectors for the purpose of directing their attention to the material points. The inspection to be allowed by the defendants at all reasonable times upon three days' notice (b). With reference to this rule generally, see also *Hyde v. Warden*, before cited (c).

[RULE IV.]
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Application
for an order
under Act of
1873, s. 25, &c.,
may be made
ex parte or on
notice.

4. An application for an order under section 25, sub-section 8, of the Act, or under Rules 2 or 3 of this Order, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said sub-section 8 it may be made either *ex parte* or with notice, and if for an order under the said Rules 2 or 3 of this Order it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application.

The Chief Clerk in Chambers refused to make an order for receiver and manager under **s. 25, subs. 8**, on the ground that it was not the practice that he should make such order except by consent. The Master of the Rolls observed that this was quite right, and said the practice under this rule was to apply by motion (d). Claim for an injunction was refused, the plaintiff failing to show that the defendant had not a good right to maintain an obstruction to his lights complained of (e). A motion for receiver by defendant was allowed, notice of motion having also been given by the plaintiff; one order was made on both motions, the plaintiff to have the conduct of proceedings, his motion being the earlier (f). Circumstances being alleged which involved the risk of an immediate loss of a trust fund, a receiver was appointed *ex parte* before service of the writ (g). An application *ex parte* was made before appearance for a receiver to protect chattels, the subject of the action; and inasmuch as by *Edwards v. Edwards*,

(a) *Melhuish v. Milton*, 24 W. R. 679; 20 S. J. 562.

(b) *Flower v. Lloyd*, 20 S. J. 703.

(c) *Ante*, p. 439; 1 Ex. D. 309; 20 S. J. 782.

(d) *Bull v. Cameron*, 20 S. J. 703.

(e) *Anon.*, W. N. 1876, 7; 20 S. J. 162.

(f) *Sargant v. Reid*, 1 Ch. D. 600; 45 L. J. Ch. D. 206.

(g) *In re H.'s Estate*, 1 Ch. D. 276; 45 L. J. Ch. D. 749; 24 W. R. 317.

W. N. 1876, 107 ; 20 S. J. 390, a receiver would not in general be entitled to take possession until he had perfected his security, the plaintiff desired possession to be taken immediately, the Court appointed the plaintiff without security interim receiver for fourteen days, or until a receiver should be appointed by order of the Vice-Chancellor, the plaintiff undertaking to deal with the property only under the direction of the Court, and to abide by any order the Court should make as to damages or otherwise (*a*). S. commenced an action in October, 1875, in the Queen's Bench Division for slander of title as patentee against P., who put in a defence and counter-claim alleging that a patent of his was being infringed by S., and claimed an injunction ; he afterwards without leave abandoned his counter-claim, and brought an original action in the Chancery Division against S., and therein moved for an injunction against S. It was objected that he had elected his remedy, and could not, without first validly removing his counter-claim from the record, bring a new action. The objection was over-ruled, and it was held that the Court had a discretion to grant an injunction under s. 25, subs. 8, and this Rule (*b*). [As to the power of the Chancery Division to order issue of writ of mandamus, see *In re Paris Skating Rink Company, Limited* (No. 2) (*c*), and notes on subs. 8 of s. 25, Judicature Act, 1873.]

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[RULE IV.]

5. An application for an order under Rule 1 may be made by the plaintiff at any time after his right thereto appears from the pleadings ; or, if there be no pleadings, is made to appear by affidavit or otherwise to the satisfaction of the Court or a Judge.

[RULE V.]

Where application for order under Rule I. may be made by plaintiff.

6. Where an action is brought to recover, or a defendant in his statement of defence seeks by way of counter-claim to recover specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court or a Judge may, at any time after such last-mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such Court or Judge, order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or Judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it.

[RULE VI.]

Where claim, &c., is made to any specific property in hands of opposite party admitting title, but claiming lien, how party claiming to recover property, may do so.

(*a*) *Taylor v. Eckersley*, 2 Ch. D. 302 ; 45 L. J. Ch. D. 527 ; 34 L. T. N. S. 637 ; 24 W. R. 450.

(*b*) *Plimpton v. Spiller*, 20 S. J. 391 ; on appeal, 412.

(*c*) 25 W. R. 767.

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ORDER LIII.

MOTIONS AND OTHER APPLICATIONS.

[RULE I.]

Application to
Divisional
Court or to
Judge in Court
to be by motion.

1. Where by these Rules any application is authorised to be made to the Court or a Judge in an action, such application, if made to a Divisional Court or to a Judge in Court, shall be made by motion.

This rule seems to enlarge very much the class of cases in which motion is the proper form of application. The old rule used to be, in the Court of Chancery at least, that applications should only be made by motion where the order sought arose out of recent proceedings, upon which there was no doubt (*a*), otherwise they should have been by petition, but that mode of procedure, except where used under particular statutes, seems to be now abolished, and, indeed, the introduction of motions for decree altered the rule in some important respects, and confined it to interlocutory motions. As to use of this rule, see also **O. LVIII., r. 18.**

Rules 1 and 2 seem to apply only to applications "in an action" (*b*).

[RULE II.]

No rule to
show cause un-
less where ex-
pressly ordered
by Rules.

2. No rule or order to show cause shall be granted in any action, except in the cases in which an application for such rule or order is expressly authorised by these Rules.

See *In the goods of Cartwright, supra* (*b*). But it seems that in proceedings, not actions, rules nisi may still be made as in the old practice (*c*).

[RULE III.]

Except where
by this rule
provided no
motion without
notice to par-
ties affected,
&c.

3. Except where by the practice existing at the time of the passing of the said Act any order or rule has heretofore been made ex parte absolute in the first instance, and except where by these Rules it is otherwise provided, and except where the motion is for a rule to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just; and any party affected by such order may move to set it aside.

(*a*) *Shipbroke v. Lord Hinchinbrook*, 13 Ves. 393; *Daniell*, 1434. See also *Like v. Beresford*, 3 Br. Ch. C. 365; *Prince v. Cooper*, 16 Beav. 546; but see *Revel v. Hussey*, 2 Ba. & Beat. 286.

(*b*) *In the goods of Cartwright*, 1 P. D. 422; 34 L. T. N. S. 72; 24 W. R. 214.

(*c*) *In the goods of Cartwright, supra*, overruling *Baigent v. Baigent*, 1 P. D. 421; 33 L. T. N. S. 462; 24 W. R. 43; *Re arbitration between R. Phillips and J. B. Gill*, 1 Q. B. D. 78; 45 L. J. Q. B. D. 136; 24 W. R. 158.

Notice to the party affected is not necessary where the application is only for a rule nisi (*a*). In the case cited, *ante Dymonds v. Croft* (*b*), it was held that a notice of motion, if one which under this rule cannot be made without notice to the parties affected, is sufficiently delivered by being filed under O. XIX., r. 6. An application to set aside an award may be made without notice, for it is under O. XL., rr. 5, 6, only for an order nisi (*c*). An action had been brought in the Court of Passage, at Liverpool, and judgment entered for £411, subject to the opinion of the Common Pleas Division under the Court of Passage Act, 1853. The case was argued, and the decision below affirmed; the defendant gave notice of appeal, and applied to the Court of Passage to stay execution. The Judge thought the application should be to the Common Pleas Division. The defendant applied to the Master in Chambers, who sent it to the Judge, and Pollock, B., in Chambers, held that he had no jurisdiction under O. LVIII., r. 16, to deal with it, not being Judge of the Common Pleas Division, and not having heard the case. An application was then made to the Court of Appeal, and this rule cited. The Court held they had no power to make an order *ex parte* to stay execution, but gave leave for short notice of motion, Mellish, L. J., expressing surprise at Pollock, B., deeming he had not jurisdiction, and intimating an opinion that a Judge at Chambers has power to act for any Division; he observed, also, that the jurisdiction of the Court of Appeal in such a case is primary and not appellate, though the application should first be made to the Court from whose decision the appeal is (*d*).

The costs of an abandoned motion will not be allowed where the notice of motion was on its face irregular (*e*). But in other cases such costs will be allowed (*f*). The Court was moved to set aside an order of reference and award, no notice having been given to the other side, under the impression that none such was needed; it being now too late to give it, the application was stopped, and leave to give notice was given, the Court clearly considering that it was under the rule necessary (*g*). In *Seale v. Lambe*, notice had been given by the plaintiff, by leave of Vice-Chancellor Malins, of a motion for injunction to be made at the sitting of the Court on April 11. When the case was opened, the Vice-Chancellor declined to hear it because of the pressure of business, but said he would make an interim order for an injunction extending over Wednesday, the regular motion day, and made the order without hearing counsel for the defendant, who declined to give any undertaking. It was apprehended that, owing to the pressure of business, the motion could not come on on the Wednesday, and that the interim order would be continued as a matter of course until after the Easter Vacation. The defendant therefore moved the Court of Appeal, which gave him leave to serve short notice of motion by way of appeal from the interim order, the motion to be heard on Wednesday morning, observing that if the Court of Appeal should discharge the interim order it could not afterwards be continued by the Vice-Chancellor (*h*). With reference to this rule see *Clarke v. Roche* (*i*).

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COURT.

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[RULE III.]

Costs, when
allowed.

(*a*) *In the goods of Cartwright*, *ante*, pp. 406, 442; 1 P. D. 422; 34 L. T. N. S. 72; 24 W. R. 214.

(*b*) *Ante*, p. 260; 3 Ch. D. 512; 45 L. J. Ch. D. 612; 35 L. T. N. S. 27; 24 W. R. 700; see also *Morton v. Miller*, 3 Ch. D. 516; 45 L. J. Ch. D. 613; 24 W. R. 723.

(*c*) *Robinson v. Robinson*, 35 L. T. N. S. 337; 24 W. R. 675; 20 S. J. 501.

(*d*) *Maclean v. Vaughan*, 20 S. J. 723.

(*e*) *Daubney v. Shuttleworth*, 1 Ex. D. 53; 45 L. J. Ex. D. 177; 34 L. T. 357; 24 W. R. 321.

(*f*) *Berry v. The Exchange Trading Co.*, 1 Q. B. D. 77; 45 L. J. Q. B. D. 224; 24 W. R. 318, sub nom. *Bury v. &c.*, 20 S. J. 132.

(*g*) *Young v. Cox*, 20 S. J. 272.

(*h*) *Seale v. Lambe*, 20 S. J. 469.

(*i*) *Ante*, p. 406; 21 S. J. 360.

RULES OF
COURT.

Ord. 53.

[RULE IV.]

Except on special leave notice of motion must be two clear days' notice, and day of hearing must be named.

4. Unless the Court or Judge give special leave to the contrary there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion.

This rule is identical with Consolidated O. XXXIII., r. 2, save that the old rule was continued by excluding Sunday and other days on which the offices were closed, except Monday and Tuesday in Easter week from the two clear days. This is probably rendered unnecessary now by reason of O. LVII., r. 2. The leave mentioned, which might be obtained on *ex parte* motion, must be stated in the notice of motion (a). As to short notice of motion, see (b).

Motions of course might be made any day, in or out of term, when terms existed (c).

A decree had been made by Vice-Chancellor Bacon for payment of money and costs. Defendant had given notice of appeal, and had applied to the Vice-Chancellor to stay execution pending the appeal, but the Vice-Chancellor had refused the application. The defendant applied to the Court of Appeal, as execution would be levied against him in a few days, and if he had to give the ordinary two days' notice of appeal from the refusal to stay execution, the appeal could not be heard till after Easter vacation. The Court said that as the application by O. LVIII. r. 17, could not be made to the Court of Appeal till it had been made to the Court below, a new notice of motion must be given, which, under the circumstances, might be short for Wednesday morning. On hearing this motion, execution was stayed on terms of bringing money and costs into Court, and under the rule in *Merry v. Nickalls*, L. R. 8 Ch. 205, the applicant had to pay the costs of the motion, it being a favour (d). Notice of appeal from Chambers to the Court was given for a day when the Court did not sit (being in vacation), and more than eight days after the decision appealed from. Held that the notice was probably bad for naming a day when the Court did not sit, and certainly bad for naming a day more than eight days after the decision appealed from (e).

See on this rule, *Daubney v. Shuttleworth*, 1 Ex. D. 53; 45 L. J. Ex. D. 177; 35 L. T. N. S. 357; 24 W. R. 321, *ante*, p. 443.

[RULE V.]

If on hearing Court or Judge should think that person to whom no notice has been given should have had notice, &c.

5. If on the hearing of a motion or other application the Court or Judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or Judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or Judge may think fit to impose.

[RULE VI.]

Hearing may always be adjourned on terms.

6. The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or Judge may think fit.

(a) *Hill v. Rimmel*, 2 M. & Cr. 641.

(b) *Hart v. Tulk*, 6 Ha. 611.

(c) *Lord Harborough v. Wartnaby*, 1 Ph. 364.

(d) *Cooper v. Cooper*, 2 Ch. D. 492; 45 L. J. Ch. D. 667; 24 W. R. 628.

(e) *Deykin v. Coleman*, 36 L. T. N. S. 195; 25 W. R. 294; see also *Crom v.*

7. The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose.

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[RULE VII.]

When plaintiff without leave may serve any notice of motion, &c.

Under this rule, see *Dymonds v. Croft*, before cited (a). Defendant not having appeared to a bill under the old practice, appearance was entered for him by the plaintiff. Defendant was attached for failure to answer, and put in prison, where he remained until liberated under the Act. Held that personal service of a notice of motion in the cause without leave was regular (b). It has been held that filing is not necessary under O. XIX., r. 6, where personal service has been made under this rule (c).

8. The plaintiff may, by leave of the Court or a Judge to be obtained ex parte, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons and before the time limited for the appearance of such defendant.

[RULE VIII.]

When plaintiff by leave obtained ex parte, may serve any notice of motion on defendant.

Costs of an abandoned motion will be given where party to move does not appear on the day fixed, and party opposing asks for costs (d). In *Aitken v. Dunbar* (e), Vice-Chancellor Malins announced a rule on this subject, that when counsel intends to ask for costs of a motion as abandoned, it is his duty before doing so to communicate his intention to the counsel instructed to move, and this communication not having been made in the case cited below, he discharged an order which he had previously made for payment of costs of a motion not brought on, and directed that the costs should be dealt with when the motion was brought on. As to time for application for costs of an abandoned motion, see (f).

ORDER LIV.

Ord. 54.

APPLICATIONS AT CHAMBERS.

1. Every application at chambers authorised by these Rules shall be made in a summary way by summons.

[RULE I.]

Applications at chambers.

2. In the Queen's Bench, Common Pleas, and Exchequer Divisions a master, and in the Probate, Divorce, and Ad-

[RULE II.]

Officers to

Samuels, 2 C. P. D. 21 ; 46 L. J. C. P. D. 1 ; 34 L. T. N. S. 423 ; 25 W. R. 45 ; *Fox v. Wallis*, 2 C. P. D. 45 ; 35 L. T. N. S. 690 ; 25 W. R. 287 ; *post*, p. 447.

(a) *Ante*, pp. 260, 443 ; 3 Ch. D. 512 ; 45 L. J. Ch. D. 612 ; 35 L. T. N. S. 27 ; 24 W. R. 700.

(b) *Sanders v. Miller*, 24 W. R. 392.

(c) *Whitaker v. Thurston*, *ante*, p. 260 ; W. N. 1876, 232.

(d) *Berry v. The Exchange Trading Co.*, *ante*, p. 443 ; 1 Q. B. D. 77 ; 45 L. J. Q. B. 224 ; 24 W. R. 318, sub nom. *Bury v. &c.*, 20 S. J. 132.

(e) 46 L. J. Ch. D. 489 ; 25 W. R. 366.

(f) *Yetts v. Biles*, 25 W. R. 452 ; 21 S. J. 361.

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[RULE II.]

transact business which may be done by Judge at chambers.
Exceptions.

miralty Division a registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act, or the Schedule thereto, or these Rules, may be transacted or exercised by a Judge at chambers, except in respect of the following proceedings and matters; that is to say,—

All matters relating to criminal proceedings or to the liberty of the subject:

The removal of actions from one division or Judge to another division or Judge:

The settlement of issues, except by consent:

Discovery, whether of documents or otherwise, and inspection, except by consent:

Appeals from district registrars:

Interpleader other than such matters arising in interpleader as relate to practice only, except by consent:

Prohibitions:

Injunctions and other orders under sub-section 8 of section 25 of the Act, or under Order LII., Rules 1, 2, and 3 respectively:

Awarding of costs, other than the costs of any proceeding before such master:

Reviewing taxation of costs:

Charging orders on stock funds, annuities, or share of dividends or annual produce thereof:

Acknowledgments of married women.

With regard to this rule, reference should be made to O. XXXV., r. 4. See also case before cited, *Hillman v. Mayhew* (a) and case below cited (b). It has been held that an order made by a registrar sitting as Judge under this order, is not for the purpose of s. 50 of the Act of 1873 an order made by a Judge in Chambers, and hence, when an order has been so made and reviewed by the Judge in Court, an appeal will not lie without special leave (c).

The following rule has been here introduced by the Rules of the Supreme Court, June, 1876, as follows:—

[RULE IIA.]

District registrar or master cannot grant leave for service of writ of summons out of jurisdiction, &c.

2A. The authority and jurisdiction of the District Registrar or of a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions shall not extend to granting leave for

(a) *Ante*, pp. 64, 114, 432; 1 Ex. D. 132; 45 L. J. Ex. D. 334; 34 L. T. N. S. 256; 24 W. R. 435.

(b) *Anon.*, 21 S. J. 279.

(c) *The Vivar*, 2 P. D. 29; 35 L. T. N. S. 782; 25 W. R. 453.

service out of the jurisdiction of a writ of summons or of notice of a writ of summons.

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3. If any matter appears to the master proper for the decision of a Judge the master may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the master with such directions as he may think fit.

[RULE III.]

Master may refer to Judge, who may refer back to master.

4. Any person affected by any order or decision of a master may appeal therefrom to a Judge at Chambers. Such appeal shall be by summons, within four days after the decision complained of, or such further time as may be allowed by a Judge or master.

[RULE IV.]

Time for appeal from master to Judge at Chambers.

Application was made to vary an order made by a master in an interpleader issue, in which the master had jurisdiction only by consent of parties. The Court held that all appeals from the master must, under this rule, be to a Judge in Chambers, whether master had by consent jurisdiction of Judge or not (*a*).

5. An appeal from a master's decision shall be no stay of proceeding unless so ordered by a Judge or master.

[RULE V.]

Such appeal no stay of proceedings but by order.

It is presumed that the word master in these rules will be read registrar, as to those Divisional Courts in which the registrar may act under r. 2 of same order.

6. In the Queen's Bench, Common Pleas, and Exchequer Divisions every appeal to the Court from any decision at Chambers shall be by motion, and shall be made within eight days after the decision appealed against.

[RULE VI]

Appeal to Court from Chambers shall be by motion, within eight days from order complained of.

The inconvenience arising from the peremptory limit of time in this rule has been to a certain extent mitigated by allowing the motion to be *pro formâ*, commenced within the eight days, and then adjourning the hearing (*b*). It is not sufficient to give notice of appeal within the eight days, the notice must be at least two clear days before the day named for the appeal, which day named, must be within the eight days (*c*). An order by a master staying execution had been reversed during vacation by a Judge; against this, it was desired to appeal. It was objected that the application was too late under the order. The Court held the time was peremptory, and that *Hallums v. Hills*, before cited (*d*), with reference to

(*a*) *Anon.*, 21 S. J. 279.

(*b*) *Wylie v. The City and County Banking Co.*, 20 S. J. 26.

(*c*) *Fox v. Wallis*, 2 C. P. D. 45; 35 L. T. N. S. 690; 25 W. R. 287.

(*d*) *Ante*, p. 387; 46 L. J. (App.) Q. B. D. 88; 24 W. R. 956.

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[RULE VI.]

Ord. 55.

ORDER LV.

COSTS.

Costs in discre-
tion of Court.Rules of Court
of Equity as to
particular costs,
not affected.On trial by
jury, costs to
follow events
unless Court
shall other-
wise order.

O. XXXIX., r. 1, which held that the four days therein mentioned, must be four days which the Court is actually sitting, and that the time might have been extended on application by O. LVII., r. 6 (a). See on this rule, also, *Deykin v. Coleman* (b); also case cited above (c).

Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity: Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the Judge before whom such action or issue is tried or the Court shall otherwise order.

It might be expected to follow as a natural consequence that by applying rules hitherto acted upon in Courts of Equity to all the Divisions of the High Court of Justice, as has been done by this Act, one result would be to establish a similar rule as to costs in all the Divisions to that which has always been the rule in Courts of Equity, and this rule in most cases effectuates that expectation. It is, however, worthy of remark and attention that s. 67 of the text of the principal Act re-enacts s. 5 of 30 & 31 Vict. c. 142, which will be seen set out *supra*, pp. 81—82, and provides express rules as to costs in certain cases. This is probably one reason for the initial words of the O. LV., on which this note is appended, "subject to the provisions of the Act," &c., which words show clearly that this rule is not to overrule s. 67 of the principal Act.

An order of reference to a master made under the Common Law Procedure Act, 1854, by consent, is not "a proceeding in the High Court" within this order (d).

This order in certain cases overrides O. XXX., r. 4, under which the plaintiff is entitled *prima facie* to costs, but may be deprived of them on sufficient ground (e). The costs of a writ of attachment ought to be applied for at the same time as the writ (f). The Court of Appeal has followed the rule as to costs formerly prevailing in the Probate Court and Admiralty Court in collision cases, where the defendant succeeded on the ground that, though he was to blame, the collision was caused through the

(a) *Crom v. Samuels*, 2 C. P. D. 21; 46 L. J. C. P. 1; 35 L. T. N. S. 423; 25 W. R. 45.

(b) *Ante*, pp. 444; 36 L. T. N. S. 195; 25 W. R. 294.

(c) *Anon.*, *supra*, p. 447; 21 S. J. 279.

(d) *Wimshurst, Hollick, & Co. v. Barrow Shipbuilding Co.*, 2 Q. B. D. 335; 46 L. J. Q. B. D. 477; 25 W. R. 557.

(e) *Broadhurst v. Willey*, W. N. 1876, 21; 20 S. J. 240.

(f) *Abud v. Riches*, *ante*, p. 405; 2 Ch. D. 528; 45 L. J. Ch. D. 649; 34 L. T. N. S. 713; 24 W. R. 637.

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fault of the compulsory pilot in command, and gave no costs to the defendant; the costs in such cases do not, as in the general rule, follow the event (*a*), but the law seems different where an action is not in the Admiralty Division (*b*). As to costs of abandoned motion, see *ante*, p. 443. As a general rule, in all cases where the appeal was not pending when the Acts came into operation, a successful appellant is to have his costs (*c*), and this rule is followed in bankruptcy (*d*). And also on appeals from County Palatine of Lancaster (*e*). If the application mentioned near the end of the rule be not made at the trial, the Judge ceases to have any jurisdiction as a single Judge (*f*). An action was tried before Lush, J., at Newcastle, at the Summer Assizes, 1876, and a verdict was returned for the defendant; the Judge had left Newcastle before the verdict was given, and while sitting at York in the Crown Court, on the application of plaintiff's counsel he ordered judgment to be entered for the defendant, without costs. On a rule calling on the plaintiffs to show cause why the judgment should not be entered for the defendant with costs, the Court held that the order was not made at the trial within the meaning of this order, nor by a Court which has been held to mean a Divisional Court, and that there was no valid order depriving the defendants of costs (*g*). In *Parsons v. Tinling* (*h*) an action for libel, in which the plaintiff had recovered one farthing damages, the Judge before whom the case was tried refused to make any order as to costs, as did also the Judge in Chambers. The Court held that this order repealed the previous law as to costs, and that the words, "the costs shall follow the event," gave the plaintiff costs notwithstanding the nominal amount of his damages; but see cases below cited overruling this case (*i*). In the Probate Division a case to be tried by a Judge and jury had been tried on circuit. The plaintiff moved to decree probate to the plaintiffs as executors, and that they might have the costs of the action. The will had been contested by the defendants, but all the issues had been found for the plaintiffs. The defendants asked for costs out of the estate. The President ordered probate, but postponed the matter of costs till he should have communicated with Lush, J. He added that if he thought the plaintiff ought to have his costs, the question would not arise, but otherwise the effect of this order would need consideration (*k*). The Master of the Rolls said the practice as to costs required alteration, as the effect of the present practice was that a successful party often lost the costs of interlocutory applications by forgetting to ask for them at the trial. Directions would now be given to the registrars to insert, without any special directions of the Court, in all orders made in this branch of the Court awarding the costs of actions, these words, "Including costs of all applications ordered to stand over until trial, and all costs reserved to be disposed of at the trial" (*l*). In a motion to make an award, a rule of

Order as to
costs to be
made at the
trial.

(*a*) *The General Birch*, W. N. 1876, 166; 20 S. J. 561; see also *General Steam Navigation Co. v. The Owners of Ship Daoiz*, 21 S. J. 478.

(*b*) *General Steam Navigation Co. v. London and Edinburgh Shipping Co.*, W. N. 1877, 156; 36 L. T. N. S. 743; 25 W. R. 694.

(*c*) *Memorandum*, 1 Ch. D. 41.

(*d*) *Ex parte Castle*, 1 Ch. D. 111; 45 L. J. Bankcy. 13; 33 L. T. N. S. 612; 24 W. R. 143; *Ex parte Masters*, 1 Ch. D. 113; 45 L. J. Bankcy. 18; 32 L. T. N. S. 613; 24 W. R. 113.

(*e*) *Anderson v. Welsby*, 20 S. J. 703.

(*f*) *Baker v. Oakes*, 2 Q. B. D. 171; 46 L. J. Q. B. D. 246; 35 L. T. N. S. 832; 25 W. R. 220.

(*g*) *Tyne Alkali Co. v. Lawson*, W. N. 1877, 18; 36 L. T. N. S. 100.

(*h*) 2 C. P. D. 119; 46 L. J. C. P. D. 230; 35 L. T. N. S. 851; 25 W. R. 255.

(*i*) *Bowey v. Bell*, 36 L. T. N. S. 640; *Garnett v. Bradley*, 2 Ex. D. 349; 46 L. J. (App.) Ex. D. 545; 36 L. T. N. S. 725; 25 W. R. 653; *Booth v. Briscoe*, 2 Q. B. D. 496; 25 W. R. 838; *ante*, p. 223.

(*k*) *Wood v. Browne*, 20 S. J. 782.

(*l*) *Memorandum*, W. N. 1876, 271.

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Court necessitated by the conduct of the other party, Field, J., intimating a doubt whether he had power to award costs to the moving party, finally decided to do so on the discretion given to the Court by this order (a).

In the case of *Green v. Wright* (b), a nonsuit was directed and afterwards set aside and a new trial granted, when a verdict was found for the plaintiff. It was held that the case was within the proviso of this order, and the costs of the first trial being costs of proceedings in the cause, followed the event of the second trial, and the plaintiff was entitled to such costs. It has been held that s. 9 of 31 & 32 Vict. c. 71, has been repealed by this rule by implication, and a motion for a certificate for costs thereunder was in consequence refused (c). But in *Garnett v. Bradley* (d), it was held that the provisions of these acts and orders did not apply to matters the subject of former particular legislation, and that the enactment of 21 Jac. 1, c. 16, as to costs in actions of slander, is still in force, notwithstanding the Judicature Acts. With reference to this rule also, see *The St. Olaf* (e). *Staples v. Young* (f). The Divisional Court has specific power to entertain an application as to costs under this order, even though no such application were made at the trial (g).

The following rule has been here introduced by the Rules of the Supreme Court, February, 1876 :—

Feb., 1876,
Rule 7.

Security for
costs is in the
discretion of
Court or Judge.

In any cause, or matter, in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form as the Court or a Judge shall direct.

Where security for costs had been given under the old practice by a plaintiff out of the jurisdiction, in a suit instituted before the Judicature Acts came into operation; held, reversing the decision of Malins, V.-C., that further security might under this rule be ordered to be given (h). Unless special reason be shown for increasing the amount, it was held by Vice-Chancellor Bacon that the old rule as to security must remain, and his Lordship's judgment was in this case affirmed on appeal (i). Security for costs may now be required at any time, but not from defendant or respondent having a right to appear, whether actually served or not (k).

On this rule, see cases of *Taylor v. Eckersley*, cited, ante, p. 71 (l), *In Re Hoskin's Trusts* (m), *Sturla v. Freccia* (n).

(a) *Twist v. Harse*, 20 S. J. 953.

(b) 2 C. P. D. 354; 46 L. J. (App.) C. P. D. 427; 36 L. T. N. S. 355; 25 W. R. 502.

(c) *The Elijah Packer*, W. N. 1877, 126.

(d) 2 Ex. D. 349; 46 L. J. Ex. D. 545; 36 L. T. N. S. 725; 25 W. R. 653.

(e) 2 P. D. 113; 36 L. T. N. S. 30; ante, p. 281.

(f) 2 Ex. D. 324; 25 W. R. 304; ante, p. 82.

(g) *Baker v. Oakes*, ante, p. 64; 2 Q. B. D. 171; 46 L. J. (App.) Q. B. 246; 35 L. T. N. S. 671, 832; 25 W. R. 220; *General Steam Navigation Co. v. London and Edinburgh Shipping Co.*, W. N. 1877, 156; 36 L. T. N. S. 743; 25 W. R. 694.

(h) *Republic of Costa Rica v. Erlanger*, 3 Ch. D. 62; 35 L. T. N. S. 19; 24 W. R. 955.

(i) *Paxton v. Bell*, W. N. 1876, 221, 249; 24 W. R. 1013; 21 S. J. 4.

(k) *Re Percy and Kelly Nickel Cobalt and Chrome Iron Mining Co.*, 2 Ch. D. 531; 45 L. J. Ch. D. 526; 24 W. R. 1057.

(l) 21 S. J. 558.

(n) W. N. 1877, 188; 21 S. J. 730.

(m) Ante, p. 70; 25 W. R. 779.

RULES OF
COURT.

ORDER LVI.

Ord. 56.

NOTICES AND PAPER, &c.

1. All notices required by these Rules shall be in writing, unless expressly authorised by a Court or Judge to be given orally.

[RULE I.]

Notices to be in writing unless otherwise ordered.

2. Proceedings required to be printed shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three quarters of an inch wide, and an outer margin about two inches and a half wide.

[RULE II.]

Form of printed proceedings.

As to this rule, see reference to it in the Order of the 12th of August, 1875, O. V., r. 1., *post*, p. 557.

3. Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript.

[RULE III.]

How affidavit to be sworn to.

ORDER LVII.

Ord. 57.

TIME.

1. Where by these Rules, or by any judgment or order given or made after the commencement of the Act, time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months.

[RULE I.]

Months, unless expressed to be lunar, shall be calendar months.

The rules as to computation of time are in some respects altered; thus in this rule months are calendar months, which is directly reversing Consolidated Orders XXXVII., Rule 10, where months not specified as calendar months were all lunar months of 28 days.

Change from old rule.

2. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time.

[RULE II.]

Sunday, Christmas Day, and Good Friday excluded in periods of less than six days.

This is substantially the same as Consolidated Order XXXVII., Rule 11, save that the old rule named the excepted days in this form, Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week.

Sundays are included in the computation of time within which an appeal must be brought. Notice of appeal must be given within the

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[RULE II.]

[RULE III.]

Where time expires on holiday, time for doing any act &c., shall be extended to the day on which offices shall next be open.

twenty-one days, and an entry of the appeal before that time makes no difference. A mistake of the registrar's clerk, misleading the appellant's solicitor as to the time for bringing an appeal, is no ground for extending the time (a). The greater part of this case is more in point upon the rules of O. LVIII., rr. 2, 3, 9, and 15, which see. See also on this rule, *Cheese v. Lovejoy* (b), cited *ante*, p. 121, and *post*, p. 455.

3. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

Appeal from an order in Chambers must be within eight days. O. LIV., r. 6. An order was made on the 13th November, notice of motion in appeal was given for the 22nd; the 21st was a Sunday. Held that the four last words of the rule extended to cases where the Court was not sitting (c). In another case an order in bankruptcy was made on 10th March; an appeal was entered with registrar of bankruptcy appeals on 4th April; on same day notice of appeal was served on respondents. The registrar's office closed for Easter vacation from 30th March to 3rd April inclusive; on opening the appeal it was objected that under O. LVIII., r. 15, it was too late, and so it was held notwithstanding this rule (d).

[RULE IV.]

As to pleadings in long vacation.

4. No pleadings shall be amended or delivered in the long vacation, unless directed by a Court or a Judge.

[RULE V.]

When time of long vacation not reckoned in time for filing, &c., pleadings.

5. The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading unless otherwise directed by a Court or a Judge.

[RULE VI.]

Court or Judge may enlarge or abridge time for doing any act or taking proceedings, &c.

6. A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

(a) *Ex parte Viney*, 4 Ch. D. 794; 46 L. J. Bankcy., 80; 36 L. T. N. S. 43; 25 W. R. 364.

(b) 2 P. D. 161; 25 W. R. 453.

(c) *Taylor v. Jones*, 1 C. P. D. 87; 45 L. J. C. P. 110; 34 L. T. N. S. 131; 20 S. J. 92.

(d) *Ex parte Saffery*, 5 Ch. D. 365; 46 L. J. Bankcy., 89; 36 L. T. N. S. 532; 25 W. R. 572.

As to costs of enlargement of time, see Rules of the Supreme Court (Costs), **O. VI.**, Special and General Provisions, 22, *post*, pp. 573, 574.

R. 6 does not apply to a case met by **O. LV.**, where application must be at the trial (*a*). The Court will not enlarge time where the application for appeal being late has come on for hearing, and its being out of time has been objected to (*b*). See upon this rule the cases before cited, *Re Jones*, *Eyre v. Cox* (*c*), *Michell v. Wilson* (*d*). In a recent case the plaintiff had obtained a verdict against a company for injuries sustained by him through the negligence of workmen engaged in repairing one of the company's bridges. Repairs were being made by a contractor called Harris, who was a co-defendant with the company in the action, and the question of liability for the act of the workmen as between Harris and the company was complicated by the provisions of the contract between them. The jury having found a verdict in favour of Harris, but having given the plaintiff damages against the company, the latter moved for a new trial on the ground of misdirection, and a rule was granted, as to which it was held that the order should be drawn up against the plaintiff only, but notice of it given to Harris. The rule being subsequently discharged, the company appealed; after argument of the motion on the merits, whereby it appeared that the liability of the company or of Harris depended on the correctness of the direction of the Judge, as to what constituted the relation of master and servant, the Court appeared inclined to allow the appeal; but the respondent objected that no order for a new trial could be made in absence of Harris. Their Lordships, considering the presence of Harris as an interested party proper, if not absolutely necessary, referred to **O. LVIII.**, r. 3, enabling them to direct notice of the appeal to be served on any party; to this rule enabling them to extend the time within which under **O. XXXIX.**, r. 1, the motion for new trial must be made; and **O. LVIII.**, r. 5, enabling Court of Appeal to exercise powers of Court of first instance; made an order, that the appeal should stand over for the defendant Harris to be served with notice of appeal, and also with notice to show cause before them why an order for a new trial should not be granted against him. The notices to be served by the plaintiff, and the parties to apply, when ready, with a view to the matter being heard by the same Judges, so as to avoid its having to be entirely re-argued. At the instance of Mellish, L. J., it was suggested for the consideration of parties that the necessity for a new trial might be avoided by their agreeing to have all questions between them settled by the Court of Appeal (*e*). The Court of Appeal has itself the power under **O. LVIII.**, r. 5, to enlarge the time.

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[RULE VI.]

*Purnell v.
Great Western
Railway Com-
pany.*

The following rule has been added to this order by the Rules of the Supreme Court, February, 1876:—

7. In Admiralty actions the Court or a Judge shall have power at any stage of the proceedings in such action, upon a motion or summons by either party, calling upon the other

[RULE VII.]

In Admiralty actions Court or Judge has power to appoint an early day for the trial, &c.

(*a*) *Baker v. Oakes*, *ante*, p. 449; 2 Q. B. D. 171; 46 L. J. Q. B. D. 246; 35 L. T. N. S. 832; 25 W. R. 220.

(*b*) *Fox v. Wallis*, 2 C. P. D. 45; 35 L. T. N. S. 690; 25 W. R. 287.

(*c*) *Ante*, p. 182; W. N. 1877, 38; 46 L. J. Ch. D. 316; 25 W. R. 303.

(*d*) *Ante*, p. 375; 25 W. R. 380.

(*e*) *Purnell v. The Great Western Railway Co.*, 1 Q. B. D. 636; 45 L. J. (App.) Q. B. D. 687; 34 L. T. N. S. 822; 35 L. T. N. S. 605; 24 W. R. 720, 909.

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[RULE VII.]

party to show cause why the trial of such action should not take place on an early day to be appointed by the Court or a Judge, to appoint that such trial shall take place on any day or within any time which to the Court or Judge shall seem fit; and for such purpose the Court or Judge shall have power upon such motion or summons to dispense with the giving of notice of trial, or to abridge the time or times appointed by these Rules for giving such notice, for the delivery of pleadings, or for doing any other act or taking any other proceeding in the action, upon such terms (if any) as the nature of the case may require.

The following new Order has been introduced by the Rules of the Supreme Court, December, 1876 :—

Ord. 57a.

ORDER LVIIA.

DIVISIONAL AND OTHER COURTS.

[RULE I.]

Proceedings
and matters to
be heard before
the Divisional
Courts; saving
clause as to
power of single
Judge.

1. The following proceedings and matters shall continue to be heard and determined before the Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein heretofore taken before a single Judge to be taken before a Divisional Court:—

Proceedings on the Crown side of the Queen's Bench Division.

Appeals from Revising Barristers, and proceedings relating to Election Petitions, Parliamentary and Municipal.

Appeals under section 6 of the County Courts Act, 1875.

Proceedings on the Revenue side of the Exchequer Division.

Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final.

Cases stated by the Railway Commissioners under the 36 & 37 Vict. c. 48.

Cases of Habeas Corpus, in which a Judge directs that a rule nisi for the writ, or the writ be made returnable before a Divisional Court.

Special cases where all parties agree that the same be heard before a Divisional Court.

Appeals from chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions, and applications for new trials in the said Division where the action has been tried with a Jury.

RULES OF
COURT.

Ord. 57a.

[RULE I.]

2. Where, by sect. 17 of the Appellate Jurisdiction Act, 1876, or by these Rules, any application ought to be made to, or any jurisdiction exercised by the Judge before whom an action has been tried, if such Judge shall die or cease to be a Judge of the High Court, or if such Judge shall be a Judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such Judge should act in the matter, the President of the Division to which the action belongs may either by a Special Order in any action or matter, or by a General Order applicable to any class of actions or matters, nominate some other Judge to whom such application may be made, and by whom such jurisdiction may be exercised.

[RULE II.]

In case of death, &c., of Judge before whom action has been tried, power of president of division to nominate some other Judge to whom any application may be made.

3. Every vacation Judge shall have the same power and authority as heretofore.

[RULE III.]

Power of vacation Judge.

ORDER LVIII.

APPEALS.

1. Bills of exceptions and proceedings in error shall be abolished.

[RULE I.]

Bills of exceptions and error abolished.

The practice with reference to appeals to the House of Lords is not altered by the Judicature Acts, and it seems that this rule in abolishing proceedings in error did not refer to error to the House of Lords (a). The Court of Appeal and not the Court of Appeal from inferior Courts has succeeded to the jurisdiction of the old Exchequer Chamber in error from the Lord Mayor's Court (b). Where it is desired to appeal from a Judge's direction to a jury, the proper course is to give ordinary notice of appeal from the Judge's ruling (c).

2. All appeals to the Court of Appeal shall be by way of re-hearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the

[RULE II.]

Appeals to Court of Appeal by re-hearing by notice of motion, &c.

(a) *Justice v. Mersey Steel and Iron Co.*, 1 C. P. D. 575 ; 24 W. R. 955 ; but see as to this the Appellate Jurisdiction Act, 1876, sect. 11, *ante*, p. 138.

(b) *Le Blanch v. Reuter's Telegraph Co.*, 1 Ex. D. 408 ; 34 L. T. N. S. 691 ; 25 W. R. 115.

(c) *Cheese v. Lovejoy*, 2 P. D. 61 ; 25 W. R. 453.

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COURT.

Ord. 58.

[RULE II.]

whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.

Form of appeal altered.

These rules will greatly simplify the practice in matters at Common Law, in which hitherto there was no appeal whatever on any interlocutory matter, nor in any way except by proceedings in error which are abolished, and which only lay in some cases. In Chancery from time immemorial re-hearings and appeals were had the whole way through; that is to say, any formal order in Court from beginning to end of a suit or proceeding might be re-heard on appeal until enrolment of the order by the Court of Chancery itself in some of its branches, and after enrolment by the House of Lords. The form of appealing in Chancery was on every decretal order, or on an order on petition, by petition directed, since 14 & 15 Vict. c. 83, to the Court of Appeal in Chancery, unless the order had been enrolled, in which case it was necessary to go to the House of Lords, to which also an appeal lay from an order of the Lord Chancellor or the Court of Appeal in Chancery, but if the order appealed from was only on interlocutory motion, and had not yet been enrolled, it was heard on a motion in appeal by the Court of Appeal in Chancery. All appeals are now to be by motion, and may be against part of the order only, in which respect the rule is not altered, as they might always have been partial only in Chancery matters.

Fresh facts may now in all cases, save as hereinafter stated (*a*), be gone into on appeal (*b*). And this rule has been extended to appeals from Master to Judge in Chambers, so that fresh affidavits may be used on such appeals (*c*). On the argument of an appeal two counsel on each side will be heard (*d*). Where cases were already stated and settled before the 2nd November, 1875, they were heard under the old practice, but where the case was not settled at that date, the new practice held good (*e*). Under this rule and r. 15 of this order, the Court gave leave to enter an appeal, from judgment on demurrer to plea, at once before the trial of issue (*f*). The Court of Appeal will not, however, except in special cases where great injury is to be apprehended from its refusal, interfere with the discretion of the Judge of first instance in matters of practice within his discretion (*g*); see **O. XXVII.**, r. 1. See further on this rule the cases before cited, *Ex parte Viney* (*h*); *Harris v. Aaron* (*i*); *Sugden v. Lord St. Leonards* (*k*). Appeals in bankruptcy to Court of Appeal are under these rules, not under those of Bankruptcy, 1870 (*l*).

In *Hastie v. Hastie* (*m*), on appeal from the Court of Chancery of the

(*a*) *Re Commission, Sale, and Sample Room Co.*, 21 S. J. 46.

(*b*) *Anon.*, per Lush, J., 20 S. J. 81.

(*c*) *Anon.*, W. N. 1875, 250; 20 S. J. 142.

(*d*) *Anon.*, W. N. 1875, 186; also 1 Q. B. D. 42.

(*e*) *Ibid.*

(*f*) *Fitzgerald v. Dawson*, 45 L. J. C. P. D. 152; 24 W. R. 129; 20 S. J. 112.

(*g*) *Golding v. Wharton Railway and River Salt Works Co.*, 1 Q. B. D. 374; 34 L. T. N. S. 474; 24 W. R. 423.

(*h*) *Ante*, p. 452; 4 Ch. D. 794; 46 L. J. Bankcy., 80; 36 L. T. N. S. 438; 25 W. R. 364.

(*i*) *Ante*, p. 71; 4 Ch. D. 749; 46 L. J. Ch. D. 488; 36 L. T. N. S. 43; 25 W. R. 353.

(*k*) 1 P. D. 154; 45 L. J. P. D. A. 49; 34 L. T. N. S. 369; 24 W. R. 479.

(*l*) *Re Gilbert*, 4 Ch. D. 794; 46 L. J. Bankcy., 80; 36 L. T. N. S. 43; 25 W. R. 364; *Ex parte Saffery*, 5 Ch. D. 365; 46 L. J. Bankcy., 89; 36 L. T. N. S. 532; 25 W. R. 572; *ante*, p. 452.

(*m*) 1 Ch. D. 562; 20 S. J. 391, 411; see *Allan v. United Kingdom Electric Telegraph Co.*, 24 W. R. 898; 20 S. J. 703.

county palatine of Lancaster, the Court of Appeal is a Court of Appeal strictly, and not of re-hearing, and no more jurisdiction can be exercised by it than could be by the Court of Appeal in Chancery formerly in like case, and no fresh evidence can be admitted.

In *Ex parte Reddish*, the trustee of a liquidating debtor had applied to the County Court to compel the repayment of money which the debtor had paid to his bankers a few days before he filed his petition, on the ground that the payment was a fraudulent preference of the bankers. The Judge set aside the payment in part, but on appeal the Chief Judge held the payment valid, as the bankers were shown to have pressed for it. Before the Court of Appeal it was urged that even if pressure were shown, still there was another ground for setting aside the payment, as the debtor had been induced to make the payment by misrepresentation of the bankers; and it was contended that under ss. 71 and 72 of the Bankruptcy Act, 1869, and this rule, all appeals are now by way of re-hearing, and it is open to the Court of Appeal to give any relief which the primary Court could have given. James, L. J., intimated an opinion that the jurisdiction of the Court in bankruptcy remains the same as before the Judicature Acts, and that such appeals are still strictly appeals. But the Court agreed that it was not open to the appellant to raise a case entirely different from that made by him in the Court below (a). As to re-hearing of an appeal, see *Flower v. Lloyd* (b).

RULES OF
COURT.

Ord. 58.

[RULE II.]

Appeals in
certain cases
not re-hearing.

3. The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit.

[RULE III.]

Notice of ap-
peal to be served
on all parties
affected but
none others.
Court may
order any other
parties to be
served.

Notice may be
amended.

A fund was claimed by three persons. The Vice-Chancellor decided that A. was entitled. C. appealed and served notice on A. only, the Court declined to decide in the absence of B., and directed notice of Appeal to be served on him. C.'s appeal was heard and dismissed. B. then asked the Court to hear his case against A., and the Court held that they had by this rule jurisdiction to try the case, though B. had not appealed (c). See on this rule *Purnell v. The Great Western Railway Company* before cited (d). *Re Gilbert and Ex parte Saffery, supra* (l); *Taylor v. Eckersley* (e).

(a) 5 Ch. D. 882; 25 W. R. 741; but see *Re Benson*, 21 S. J. 47.

(b) 25 W. R. 793; 21 S. J. 708; *ante*, p. 17.

(c) *Hunter v. Hunter*, W. N. 1876, 138; 24 W. R. 504, 527; 20 S. J. 450; but see *Harris v. Aaron*, *ante*, p. 456.

(d) *Ante*, p. 453; 1 Q. B. D. 636; 45 L. J. (App.) Q. B. D. 687; 34 L. T. N. S. 822; 35 L. T. N. S. 605; 24 W. R. 720, 909.

(e) *Ante*, p. 71; 21 S. J. 558.

**RULES OF
COURT.**

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[RULE IV.]

Notice of appeal from judgment to be fourteen days' notice; from interlocutory order four days.

4. Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice.

It is not easy to say what is the distinction between an interlocutory judgment on which a fourteen days' notice of appeal must be given, and an interlocutory order on which a four days' notice is required; therefore any appellant, whether the subject of his appeal be or be not a final judgment, should give the longer notice.

A decree was made on the 22nd of March, 1876. On the 21st of March, 1877, plaintiffs served notice of appeal upon one of the defendants, naming the 4th of April as the day for hearing the motion. The office was closed on the 2nd and 3rd of April; on the 4th the plaintiffs' solicitor went to the office and asked the order of course clerk whether the appeal ought to be entered on that day, and was told that any day before the sitting of the Court would do. The plaintiffs' solicitor accordingly went to the office again on the 9th of April, the day before the sittings recommenced, and was then told by the Clerk that he had made a mistake, and that it was too late to enter the appeal without special leave. The Court under these circumstances gave the leave (a).

[RULE V.]

Court of Appeal to have full powers of amendment and discretionary power to take fresh evidence, &c.

5. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just.

(a) *The Phosphate Sewage Co. v. Hartmont*, 21 S. J. 457.

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COURT.

Ord. 58.

[RULE V.]

Power to receive new evidence very much enlarged.

Former law on this head.

The power to receive further evidence in this rule is very much enlarged ; the rule formerly was, that in Chancery it was not in general competent to either party to enter into any new evidence (a) ; evidence, however, taken before the original hearing, though not used (b) or entered in the decree (c) might be read, and documents not in evidence at the original hearing have been permitted to be read on an appeal (d) ; but an order to prove them as exhibits at the hearing of the appeal must have been obtained which might have been moved for *ex parte* (e) ; No evidence was receivable of matters which had occurred since the original hearing (f).

Where through the inadvertence of counsel, plaintiff had omitted to prove a will of real estate, in consequence whereof the bill was dismissed, he was allowed to prove it at the re-hearing on terms, but the will was not disputed, and the omission arose solely from the inadvertence of counsel (g), and in other cases new evidence has been allowed to be read *de bene esse* (h).

If a witness had been convicted of perjury since the hearing, that fact might, it would seem, have been brought before the Court on an appeal ; so where a witness in an answer to a bill filed against him since the hearing, had confessed that on the day he was examined he took a bond from the plaintiff whereby the latter bound himself that, if he recovered the estate in question, he would convey part of it to the witness, this answer was allowed to be read at the hearing to affect the witnesses' evidence (i).

The House of Lords was even more strict in excluding all evidence on appeal not received below, and it did not allow evidence received below to be objected to, unless the reception of that evidence were among the grounds of appeal (k). If evidence had been rejected below, which ought to have been received, the House of Lords, used to remit the cause to the Court below, but would first look at the rejected evidence to see whether had it been admitted it could have affected the judgment of the House (l).

House of Lords did not allow evidence received below to be objected to on appeal, &c.

Hitherto also the rule has been that on re-hearing, no party could have any benefit of the judgment of the Court of Appeal in reforming the order appealed from, if he had not been an appellant, although it should appear that the decree was erroneous against him (m) ; but this was subject to

(a) *Addison v. Hindmarsh*, 1 Vern. 442 ; *Whitworth v. Whyddon*, 2 Mac. & Gord. 56. See *Jenner v. Morris*, 1 L. R. Ch. 603 ; *Topham v. Duke of Portland*, 18 W. R. 235.

(b) *Cunyngham v. Cunyngham*, Amb. 90 ; *Goodyer v. Lake*, Amb. 9, n. 4 ; *White v. Fussell*, 1 V. & B. 153 ; *Hedges v. Curdonnel*, 2 Atk. 408 ; *Williams v. Goodchild*, 2 Russ. 91 ; *Glover v. Daubney*, 4 De. G. F. & J. 561 ; *Seton*, 1155.

(c) *Cragg v. Alexander*, 16 W. R. 961.

(d) *Williams v. Goodchild*, 2 Russ. 91 ; *Walker v. Symonds*, 1 Mer. 37, n. 2 ; 2 Y. & C. 478, note (a) ; *Higgins v. Mills*, 5 Russ. 287 ; *Lovell v. Hicks*, 2 Y. & C. 472-478 ; *Re Wiltshire Iron Co., Ex parte Pearson*, L. R. 3 Ch. 443. See *Glover v. Daubney*, 4 De G. F. & J. 561.

(e) *Herring v. Cloberry*, Cr. & Ph. 251.

(f) *Lambe v. Orton*, 33 L. J. Ch. 81.

(g) *Hood v. Pimm*, 4 Sim. 101.

(h) *Dashwood v. Lord Bulkeley*, 10 Ves. 230-236 ; *Buckmaster v. Harrop*, 13 Ves. 456-458 ; *Dawson v. Prince*, 2 De G. & J. 41-43 ; *Hume v. Pocock*, L. R. 1 Ch. 379-383.

(i) *Needham v. Smith*, 2 Vern. 463.

(k) *Eden v. Earl of Bute*, 1 Br. P. C., 465 ; and see *Baesh v. Moore*, 3 Bro. P. C. 546 ; and *Button v. Price*, Prec. in Chy. 212 ; *Seton*, 1163 ; Macq. Pr. of H. of Lords, 171 ; *Daniell*, 1368.

(l) *Maccabe v. Hussey*, 5 Bligh, N. S. 715-729.

(m) *Tasker v. Small*, C. P. Coop. 255 ; and see *Pardo v. Bingham*, 4 L. R. Ch. 735.

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COURT.

Ord. 58.

[RULE V.]

No party who
had not ap-
pealed could
have order re-
formed in his
favour.

exception, for the Court on appeal had power to deal with the whole case, and therefore, where a decree had been made against several defendants, it was held that the bill might be dismissed against all on the appeal of one only (a). This case, however, is distinctly at variance with *Tasker v. Small* (b), and seems to have been decided on this point without argument.

Some of the matters under this rule have already been treated of under r. 2, and the questions as to costs have been for the most part noticed under O. LV.; these we shall not again refer to, but shall here notice matters not before dwelt on.

The name of a shareholder being struck off the list of contributories on a winding up, the company appealed and applied to the Vice-Chancellor to order the respondents to make an affidavit of documents. The Vice-Chancellor held that there was no action before him within the meaning of O. XXXI., r. 11; application was therefore made to the Court of Appeal, who held that the Court had jurisdiction to make the order (c). A subpoena was allowed by the Court of Appeal to be served upon a witness, without prejudice to the question, whether his evidence would be received or not, no evidence having been given by him in the Court below (d). Objection was taken that the evidence offered did not relate to proceedings in the Court of primary jurisdiction, to the officer of which it was offered, but to proceedings in the Court of Appeal. It was ordered that in any appeal evidence of this nature should be received by the officer of the Court of Primary Jurisdiction, and dealt with in the same way as evidence in the cause (e). The Common Pleas Division had decided on a special case stated by an arbitrator; on appeal, it appearing that the Common Pleas Division had taken a view of the facts not in contemplation of the parties, the appellants wished to have the correspondence added to the case, or to have the case referred to the arbitrator, and applied to the Court of Appeal *ex parte*, for leave to have a day fixed for hearing an original motion on notice to the respondent to this effect. The Court thought such motion was unnecessary, but directed that notice should be given to the respondents that, on the hearing of the appeal, application would be made to bring such correspondence in evidence before the Court (f). Evidence not allowed below was allowed on appeal (g), in which case it was held that at no period is it too late to produce additional evidence to show that confusion arose from double signification of a word. In another case defendant moved that the plaintiff should give the security for costs of appeal from an order striking out statement of claim as embarrassing. They had appeared separately by six counsel in the cause, but now joined, and appeared by two counsel on motion for security of costs. They asked for £80 security. The Court held the sum unnecessarily large, and ordered security for £20, saying that the defendants being in the same interest might as well join in their defence (h). With reference to this rule, see further the cases before cited of *Purnell v. The Great Western Railway Co.* (i), *Re Commission, Sale, & Sample Room Co.* (k).

(a) *Kent v. Freehold Land and Brickmaking Co.*, 3 L. R. Ch. 493-495.

(b) See note (m), ante, p. 459.

(c) *Re National Funds Assurance Co.*, on appeal, 4 Ch. D. 305; 46 L. J. Ch. D. 183; 35 L. T. N. S. 689; 25 W. R. 158.

(d) *Gover's Case*, 45 L. J. Ch. D. 83; 24 W. R. 36.

(e) *Watts v. Watts*, 45 L. J. Ch. D. 658; 24 W. R. 489; 20 S. J. 430.

(f) *Justice v. The Mersey Steel and Iron Co.*, 24 W. R. 199; see also *Hastie v. Hastie*, 1 Ch. D. 562; 45 L. J. Ch. D. 288; 34 L. T. N. S. 13.

(g) *Bigsby v. Dickinson*, 4 Ch. D. 24; 46 L. J. Ch. D. 280; 35 L. T. N. S. 679; 25 W. R. 89.

(h) *Cashin v. Cradock*, 20 S. J. 722.

(i) *Ante*, p. 453; 1 Q. B. D. 636; 45 L. J. Q. B. D. 687; 34 L. T. N. S. 822; 35 L. T. N. S. 605; 24 W. R. 720, 909.

(k) *Ante*, p. 456; 21 S. J. 46.

Fresh evidence may be allowed on an appeal in bankruptcy, but quære whether this power be not independent of this rule (a); see *Harris v. Aaron* (b). As to costs of the appeal, see case before cited, *The General Steam Navigation Co. v. The Owners of the ship Daoiz* (c). A petition to wind up by a shareholder was opposed by the company and by creditors, it was dismissed, but no costs allowed to opposing creditors. The petitioners appealed, and served notice on the company, but not the creditors. The Court of Appeal affirmed the order, dismissing the petition. The opposing creditors appeared on the appeal, and asked for their costs below and on the appeal. It was held they were entitled to appear, though not served, and costs of the appeal were allowed them, but not the costs below. The Court could not open the order below for the mere purpose of making a new rule on costs (d). On this rule, see *Ex parte Reddish* (e). Where plaintiff had appealed, and as to matter between co-defendants, some of the defendants had given notice that it was their intention to raise matter on appeal, but the notice was out of time and abortive, the Court held that nevertheless it was open to them, on the plaintiff's appeal, independently of any notice by the respondents, or any of them, to make the correct order on the whole case, and amended the decree on the matter between the defendants omitting inquiries which they thought ought not to have been ordered (f).

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[RULE V.]

6. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall, within the time specified in the next Rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

[RULE VI.]

No notice of cross appeal necessary. If respondent intend to contend for variation, he shall give notice to parties affected, &c.

It was, as might be conjectured from the last note, necessary hitherto, if any party, not joined in an appeal as co-petitioner, wished to dispute any part of a decree or order, that he should present a petition himself, otherwise he could not be heard in support of the appeal (g), or in opposition to any part of the decree not appealed from (h).

See *Kevan v. Crawford*, *supra* (f).

(a) *Re Benson*, 21 S. J. 47.

(b) *Ante*, p. 71; 4 Ch. D. 749; 46 L. J. Ch. D. 488; 36 L. T. N. S. 43; 25 W. R. 353.

(c) *Ante*, p. 449; 21 S. J. 478.

(d) *Re New Gas Co.*, W. N. 1877, 118; 25 W. R. 643; 21 S. J. 538; see also *Harris v. Aaron*, *ante*, p. 71; 4 Ch. D. 749; 46 L. J. Ch. D. 488; 36 L. T. N. S. 43; 25 W. R. 353.

(e) 5 Ch. D. 882; 25 W. R. 741; *ante*, p. 457.

(f) *Kevan v. Crawford*, 21 S. J. 668.

(g) *Preston v. Preston*, W. N. 1870, 56, and cases on p. 459, note (m).

(h) *Lord Brooke v. Earl of Warwick*, 13 Jur. 547; *Tasker v. Small*, C. P. Coop. 255; see *Blackburn v. Jepson*, 2 V. & B. 359.

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[RULE VII.]

Time for such
notice.

7. Subject to any special order which may be made, notice by a respondent under the last preceding Rule shall in the case of any appeal from a final judgment be an eight days' notice, and in the case of an appeal from an interlocutory order a two days' notice.

On this rule see *Harris v. Aaron*, before cited (a).

[RULE VIII.]

Party appeal-
ing to produce
order or office
copy, and leave
copy notice of
appeal for
filing, &c.

8. The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper lists of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a Judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal.

If the party moving in appeal do not get his appeal set down within the time named in his notice of appeal (see r. 15), *post*, or, if Court be not then sitting, on the next day on which it does sit, the respondent is entitled to treat the motion as abandoned (see r. 9)(b). The Queen's Bench Division had made an order that the defendants should pay money into Court. The defendant on the 18th Jan., 1877, gave the plaintiff four days' notice of motion for appeal, but did not produce to the officer of the Court the order, nor leave with him a copy of the notice of motion as directed by the rule, and the motion did not appear in the Court paper. The plaintiff applied for costs of the motion as abandoned; the Court held that there was nothing before it, and the plaintiff must make a substantive motion for his costs (c). On the 30th June, Malins, V.-C., refused an interlocutory order to the plaintiffs, and directed they should pay the costs; on July 19th the plaintiffs gave notice of appeal, naming the 24th July as the day for hearing (under r. 4); the order was not entered by the defendants till the 22nd July, and the plaintiff's solicitor was unable to procure an office copy until July the 27th. On the 28th he attended at the registrar's office to set down the appeal; the registrar refused to set it down, as the day named in the notice was passed. The Court directed the appeal to be set down, as the plaintiffs could not be deprived of their right of appeal by delay of the defendants. This rule does not apply to an appeal from a mere refusal of an application, in such case an appeal may be set down without production of the order or of a copy of it (d).

[RULE IX.]

Time for
appeal from
order in matter
of winding-up
or in bankrupt-
cy, &c.

9. The time for appealing from any order or decision made or given in the matter of the winding up of a company under

(a) See note (b), *ante*, p. 461.

(b) *Re National Funds Assurance Co.*, 4 Ch. D. 305; 46 L. J. Ch. D. 183; 35 L. T. N. S. 689; 25 W. R. 158.

(c) *Webb v. Mansel*, 2 Q. B. D. 117; 25 W. R. 389; see also *Price v. Price*, 21 S. J. 478.

(d) *Smith v. Grindley*, 3 Ch. D. 80; 35 L. T. N. S. 112; 24 W. R. 956.

the provisions of the Companies Act, 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under Rule 15.

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[RULE IX.]

The time given in O. LVIII., r. 15, *post*, is twenty-one days for an interlocutory order, from the time the order is signed, entered, or otherwise perfected.

This rule alters r. 143 of the Bankruptcy Orders, 1870, as explained by *Ex parte Hinton*, L. R. 19 Eq. 266, by which the time for appeal was calculated from the time of pronouncing the order (*a*). The rule extends to a winding-up order itself (*b*), and to appeals from orders on petitions under the Trustee Relief Act (*c*). Appeals within twenty-one days from the signing of the order by the Chief Judge in bankruptcy, though not within twenty-one days from the decision, are in time (*d*).

In *Harris v. Newton* (*e*), application was made on June 9th for leave to appeal from order of Malins, V.-C., made on 13th January. The order was on a petition in an old suit, and directed payment of a fund over to the person whom the Court held entitled, the tenant for life whereof had recently died. The Court held that this was a final order, and that therefore leave was not required, as a year is allowed for appeal by the Act.

10. Where an *ex parte* application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a Judge of the Court below or of the Appeal Court may allow.

[RULE X.]

Ex parte order refused below may be applied for within four days of refusal, or further time if allowed.

On an appeal under this rule from the order of the Common Pleas Division, refusing a rule under s. 43 of 19 & 20 Vict. c. 108, to compel the Judge of a County Court, to sign a case for appeal, held that such rule is discretionary, and was rightly refused (*f*). The four days having expired pending the Christmas vacation, held that the days during which Court of Appeal was not sitting might be treated as non-existent for the purposes of this rule (*g*).

11. When any question of fact is involved in an appeal,

[RULE XI.]

Where fact

(*a*) *Re Tellwright*, 20 S. J. 501 ; see (*e*), *post*.

(*b*) *Re National Funds Assurance Co.*, 4 Ch. D. 305 ; 46 L. J. Ch. D. 183 ; 35 L. T. N. S. 689 ; 24 W. R. 158.

(*c*) *Re Baillie's Trusts*, 4 Ch. D. 785 ; 46 L. J. Ch. D. 330 ; 35 L. T. N. S. 917 ; 25 W. R. 310.

(*d*) *Ex parte Viney, in re Gilbert*, 4 Ch. D. 794 ; 46 L. J. Bankcy. 80 ; 36 L. T. N. S. 43 ; 25 W. R. 364 ; *Ex parte Garrard*, 5 Ch. D. 61 ; 46 L. J. Bankcy., 70 ; 36 L. T. N. S. 42 ; see *supra* (*a*) ; *Ex parte Saffery, ante*, p. 452 ; 5 Ch. D. 365 ; 46 L. J. Bankcy., 89 ; 36 L. T. N. S. 532 ; 25 W. R. 572.

(*e*) 21 S. J. 630.

(*f*) *Sharrock v. London and N. W. Railway Co.*, 1 C. P. D. 70 ; 33 L. T. N. S. 341 ; 24 W. R. 346.

(*g*) *Marcus v. The General Steam Navigation Co.*, 20 S. J. 211.

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[RULE XI.]

involved in
appeal, manner
in which evi-
dence to be ad-
duced in Court
of Appeal.

the evidence taken in the Court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows :

- (a.) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed.
- (b.) As to any evidence given orally, by the production of a copy of the Judge's notes, or such other materials as the Court may deem expedient.

On an application, the Court intimated that, notwithstanding this rule, it would not require additional office copies of the affidavits to be taken for production to the members of the Court, but that the office copies of their own affidavits, usually taken by the solicitors on each side, and the ordinary copies supplied by them to the solicitors on the other side, would with the assistance of the briefs of the junior counsel in the cause suffice, the affidavits not being printed, and being of great length and expense to copy (a). In *Sickles v. Morris* (b), where it was important to avoid delay, and the affidavits were voluminous and had not been printed, the Court ordered the officer in charge of the original affidavits to attend with them at the hearing of the appeal, and waived printed or office copies. In the case before mentioned, of *Bigsby v. Dickinson* (c), evidence refused below was received on appeal. In *Amis v. Clarke* a verified copy of the notes of a County Court Judge was required at the hearing of an appeal from his decision (d), and a charge for a copy of shorthand writers' notes of proceedings in like case was allowed as part of costs of appeal (e). In *Leadley v. Sykes* (f), the Court of Appeal said that as the practice of taking *vivâ voce* examinations was now made the rule in the Chancery Division, a proper record of the evidence ought to be taken for the use of the Court of Appeal; this remark was made on it appearing that no shorthand notes of the cross-examination of a witness on his affidavit had been taken, in the belief that the costs thereof would not be allowed. On the application of the parties, an order was made that a copy of the Judge's notes should be printed for the purpose of appeal (g). In another case the Vice-Chancellor declined to allow parties to take copies of his notes, though ready to allow copies to be made for the Court of Appeal, and the Court of Appeal declined to order leave to the parties to take copies (h).

[RULE XII.]

Where evi-
dence not
printed below,
Court below or
Judge may
order printing
of all or part
for appeal.

12. Where evidence has not been printed in the Court below, the Court below or a Judge thereof, or the Court of

- (a) *Crawford v. Hornsea Steam Brick and Tile Works Co.*, 24 W. R. 422.
- (b) 45 L. J. (App.) C. P. D. 148; 24 W. R. 102; 20 S. J. 112.
- (c) *Ante*, p. 460; 4 Ch. D. 24; 46 L. J. Ch. D. 280; 35 L. T. N. S. 679; 25 W. R. 89.
- (d) 20 S. J. 98.
- (e) *Ex parte Sawyer*, 1 Ch. D. 698; 45 L. J. Bankcy. 56; 33 L. T. N. S. 759; 24 W. R. 375.
- (f) W. N. 1875, 252.
- (g) *Anon.* W. N. 1876, 23; 20 S. J. 242.
- (h) *Colyer v. Lee*, 20 S. J. 451; *Woodley v. The Metropolitan District Railway Co.*, 20 S. J. 450.

Appeal or a Judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a Judge thereof shall otherwise order.

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[RULE XII.]

Party printing without order to bear costs, &c.

In *Bigsby v. Dickinson* (a), the costs of transcribing and printing the shorthand notes of evidence, amounting to £300, was allowed, but not the costs of the attendance of the shorthand writer (b).

13. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the Judge to a jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient.

[RULE XIII.]

On appeal, question as to Judge's ruling how settled.

14. No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just.

[RULE XIV.]

No order unappealed from shall bar Court from making such order as may seem right.

See on this rule *White v. Witt*, cited on r. 15, *post*, p. 468 (c); *Sugden v. Lord St. Leonards* (d).

15. No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

[RULE XV.]

No appeal from interlocutory order, later than twenty-one days from order, and no other appeal later than one year, &c.

Though a year had elapsed since judgment was signed, the plaintiff's right to appeal was not barred, judgment having been given before the act, and due notice of appeal having been given in time, the delay arising because the same point was pending in another appeal (e). An application for leave to extend time, where the order in some respects seemed a

Time enlarged where judgment before acts.

(a) 4 Ch. D. 24; 46 L. J. (App.) Ch. D. 280; 35 L. T. N. S. 679; 25 W. R. 89.

(b) *S. C.*, 4 Ch. D. 24; 25 W. R. 122; 21 S. J. 147; see also *Re Caerphilly Colliery Co.*; *Re Sir E. Pearson*, 46 L. J. Ch. D. 339; 25 W. R. 618.

(c) *Post*, p. 468; 5 Ch. D. 589; 36 L. T. N. S. 123; 37 L. T. N. S. 110; 25 W. R. 435.

(d) 1 P. D. 154; 34 L. T. N. S. 369; 24 W. R. 479.

(e) *Taylor v. Greenhalgh*, 24 W. R. 311.

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[RULE XV.]

On special
grounds.Security for
costs.Special
circumstances.

final order, was allowed, subject to objection to be raised at the hearing, if the respondents thought fit (a). On an application *ex parte* for leave to appeal, notwithstanding more than a year had elapsed from the judgment appealed from, the authority on which the judgment rested having since been overruled in the House of Lords, the *ex parte* application was refused, but leave was given to serve the respondent with notice of motion for the leave required (b). And in *Hime v. Campbell* notice of decree had been served on persons not originally parties, who were interested in the property affected by it, on the 23rd of January, 1877, and they, on the 7th of February, 1877, obtained leave to attend proceedings under the decree. They then applied to the Court of Appeal for leave to appeal from the decree, notwithstanding the expiration of more than a year from its date, and the Court held that they had shown special circumstances and might appeal (c). Leave was held not necessary to serve notice of motion, that the plaintiff be ordered to give security for costs of the appeal (d). In *re Tees Bottle Co.* a motion that appellant should give security for costs of appeal was ordered to stand over to answer affidavits, but the Court ordered that no expense in the meanwhile should be incurred with reference to the appeal, nothing further to be done, and the appeal not to be placed in the paper until the motion had been disposed of (e). This matter coming on again, it appeared that the appellant had been arrested on a small debt in a County Court suit. The Court of Appeal considered this a special circumstance, justifying an order for security for costs, Mellish, L. J., saying he thought "special circumstances" in such case must mean either the insolvency of the appellant, or the fact that he resided out of the jurisdiction. It could hardly be right, he thought, to require security from a solvent man, living within the jurisdiction (f). An application on account of the plaintiff, respondent on appeal, that appellant should give security for costs of appeal, no special reason being given, the application was refused (g). An application for security for costs was held too late after the costs had been incurred (h). An appellant was ordered to give security for costs of appeal, on the grounds of his poverty, where the evidence was very voluminous. The appeal was stayed till the £50 should be lodged, but the Court refused to make an order that it should be dismissed in default of the lodgment being made within given time (i); see *Vale v. Oppert* (k).

In the case of *Judd v. Green* (l), security for costs was ordered, but only one sum, though several motions were made by several respondents. In Admiralty appeals, security for costs is not ordered unless on fair grounds (m). On an application that the appellant should give security for costs, on the ground that several bankruptcy petitions had been presented against him, one of which was still pending; that the case before the Vice-Chancellor had occupied sixteen days, and the fees paid

(a) *Cross v. Barber*, 21 S. J. 68.(b) *Evennett v. Lawrence*, 4 Ch. D. 139; 46 L. J. Ch. D. 119; 25 W. R. 107.

(c) 21 S. J. 417.

(d) *Grills v. Dillon*, 2 Ch. D. 325; 45 L. J. Ch. D. 432; 34 L. T. N. S. 781; 24 W. R. 481.(e) *Re Tees Bottle Co.*, 20 S. J. 542.(f) *Re Tees Bottle Co.*, 20 S. J. 584.(g) *Wall v. Dunn*, 20 S. J. 561.(h) *Grant v. Banque Franco-Égyptienne*, 1 C. P. D. 143; 34 L. T. N. S. 470; 24 W. R. 339.(i) *Wilson v. Smith*, 2 Ch. D. 67; 45 L. J. Ch. D. 292; 34 L. T. N. S. 471; 24 W. R. 421.

(k) 5 Ch. D. 633; 25 W. R. 610.

(l) 20 S. J. 500.

(m) *The Victoria*, 1 P. D. 280; 34 L. T. N. S. 931; 24 W. R. 596.

to plaintiff's counsel amounted to £640, the Court ordered security for £200, either by the deposit of money in Court, or by bond, with sureties. Costs of the application to be costs of appeal (a). On an application that a defendant company should secure the costs of appeal presented by them, a petition to wind up the company was pending, and it had passed a resolution to wind up voluntarily, which had not yet been confirmed. Evidence was given by the company that they had more than enough to pay their debts. The Vice-Chancellor directed that the security should be given and £100 to be deposited. The costs of the application to be costs of appeal (b). The order of a Divisional Court of Appeal that a County Court Judge should show cause why he should not sign a case on appeal from his decision, was on cause shown discharged with costs; the defendants, who had obtained the rule thus discharged, appealed from the discharge; the respondents, of whom the County Court Judge was one, moved that the defendants should give security for costs of the appeal; and the clerk to their solicitor, deposing that costs of proceedings in the Exchequer Division had been taxed at £28 12s. 4d., that request had been made of the appellants for payment thereof, and that they had not been paid, and that in his belief the appellants were unable to pay them, this affidavit was uncontradicted. The appellants, quoting *Wilson v. Smith*, (2 Ch. D. 67, 24 W. R. 421), argued that distinct and positive evidence of the insolvency of the appellants was required. The Court, however, ordered them to deposit £20 in Court, and stayed proceedings on appeal till this should be done, giving as reasons: 1st. That the Judge was a respondent, and ought not to be vexed without an indemnity against costs; 2ndly. This was a second appeal on a point which had been twice argued in the Exchequer Division; 3rdly. The costs of previous hearing had not been paid, though demanded; and 4thly. The appellants had not chosen to contradict the evidence as to their means of payment, which, being entirely within their own knowledge, they might have contradicted if untrue (c). In *Harris v. Harris* (d), an action for nullity of marriage, the action was dismissed, and the husband gave notice of appeal. The wife applied to the Court of Appeal for an order that the husband should give security for costs of the appeal, on the ground that, by the practice of the Divorce Division, a wife, respondent in an action by her husband, is entitled to security for her costs; and that, when under the old practice the appeal was to the House of Lords, security for the costs of the appeal was given. The Court made an order referring the matter to the Registrar of Divorce Division to ascertain the proper amount of security to be given.

In *Grant v. Banque Franco-Égyptienne* (e), it was held, that the appellants being a foreign corporation was a special circumstance within the meaning of the last clause of this rule, especially as their costs were secured by an indemnity, and security was ordered from them as prayed. In *The International Financial Society v. The City of Moscow Gas Co.* (f), the plaintiffs applied that the defendants, a limited company in liquidation, should give security for costs of an appeal which they had presented in an action for foreclosure, the plaintiffs being mortgagees of the defendant's property. The security was insufficient, and the defendants had no assets save the equity of redemption. They had instituted a cross-action to set aside the

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[RULE XV.]

Foreign cor-
poration.

(a) *Phosphate Sewage Co. v. Hartmont*, 2 Ch. D. 811; 20 S. J. 603; 21 S. J. 789; see also *Mackett v. The Herne Bay Commissioners*, 21 S. J. 537.

(b) *Brown v. Brown & Co.*, 21 S. J. 46.

(c) *Clarke v. Roche*, 46 L. J. Ch. D. 372; 36 L. T. N. S. 78; 25 W. R. 309.

(d) 21 S. J. 630.

(e) 2 C. P. D. 430.

(f) 21 S. J. 649.

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[RULE XV.]

Whether ap-
peal to Court
of Appeal
after enrol-
ment.Time for
appeal.Result of
failure to give
security on
its being
ordered.

mortgage, and the decree in question was made in both actions. The defendants had already given security in the cross action for the costs of appeal by a bond of the liquidators for £500. It was urged that this security was sufficient for the costs of appeal in both cases, and the liquidators were prepared to undertake that the security should extend to the costs in both actions; but the Court held that as the bond did not technically extend to the costs of the appeal in the foreclosure, the plaintiffs were entitled to security therein, the defendants must therefore give security for £100 additional.

An insolvent appellant was exempted from giving security for costs of an appeal where the matter of the case on the authority whereof the judgment against him was found, had never been submitted to the decision of the Court of Error (a).

Before the Judicature Acts no appeals to any Court of Appeal, other than the House of Lords, could be made from an order in Chancery after enrolment. This rule, the Court held, still existed, and the Court of Appeal was powerless to order the enrolment to be vacated, which the Lord Chancellor alone could do (b); but see *Hastie v. Hastie*, before cited (c). A suit was instituted before Nov., 1875, in the Court of Chancery, to enforce specific performance of an agreement by the defendants to purchase a colliery from the plaintiffs; a cross suit was instituted also before Nov., 1875, to set aside the agreement, on the ground of fraud. The Vice-Chancellor refused the application that the issues of fact in the suit and cross suit might be tried before Judge and jury. This order was made on the 27th of May, and notice of appeal was given on the 24th June. It was objected that the appeal was late. It was urged by the appellants that the Vice-Chancellor made no order on the motion, save that its costs should be costs in the cause, which order was not passed and entered till the 14th June. The Court held this made no matter, the order appealed from, was the refusal of the application, and not the order as to costs (d). In *Cox v. Barker* (e), a demurrer put in by Barker was overruled; in cross action, *Barker v. Cox*, the Vice-Chancellor had ordered a demurrer by Cox to stand over till the hearing; Barker had given ordinary notice of appeal; notice of appeal from order on Cox's demurrer was also given, but being from an interlocutory order, it was likely to come on earlier. An application was made that both appeals should be heard together, and that Barker's should be advanced by being placed in the interlocutory list. The Court assented, saying that though an order on demurrer was not interlocutory, still that the object of a demurrer being to save time, arrangement ought to be made to enable such orders to be brought on speedily. But on this matter, see *London, Chatham, and Dover Railway Co. v. The Imperial Mercantile Credit Association*, L. R. 3 Ch. 231.

With reference to this rule, see case before cited, *Re National Funds Assurance Co.* (f).

In the case of *Judd v. Green*, mentioned before on another point, appellant was ordered to give security for costs, with which order he

(a) *Rourke v. White Moss Colliery Co.*, 1 C. P. D. 556.

(b) *Allan v. The United Kingdom Telegraph Co.*, 24 W. R. 898; 20 S. J. 703.

(c) *Ante*, p. 456; 2 Ch. D. 304; 20 S. J. 391, 411.

(d) *Swindell v. Birmingham Syndicate*, 3 Ch. D. 127; 45 L. J. Ch. D. 756; 35 L. T. N. S. 111; 24 W. R. 911; see also *Trail v. Jackson*, 4 Ch. D. 7; 46 L. J. Ch. D. 16; 25 W. R. 36; *Smith v. Grindley*, *ante*, p. 462; 3 Ch. D. 80; 35 L. T. N. S. 122; 24 W. R. 956; 20 S. J. 782.

(e) 3 Ch. D. 359; 20 S. J. 723.

(f) *Ante*, p. 463; 4 Ch. D. 305; 46 L. J. Ch. D. 183; 35 L. T. N. S. 689; 24 W. R. 158.

neglected to comply for nine months. The Court, on the application of the respondent, dismissed the appeal with costs for want of prosecution, and gave the respondent costs also of the motion to dismiss, as well as of the motion for security (a); and in *Vale v. Oppert* a similar order was made, though no time had been limited within which security should be given (b). It makes no difference in the time within which an appeal must be brought from an interlocutory order that such order is embodied in a decretal order made on the further consideration of a suit (see *ante*, p. 466) (c).

On this rule see also the cases before cited of *Re Baillie's Trusts* (d), and *Ex parte Viney, in re Gilbert* (e), *Ex parte Garrard* (f), *Re Tellwright* (g), *Harris v. Newton* (h), *Ex parte Saffery* (i).

16. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may so order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.

On this rule, see *Flower v. Lloyd* before cited (k). When an application is made to stay proceedings, the applicant will in general be put upon terms (l). Proceedings will be stayed on proper grounds under such terms, or for such time as the Judge may order (m). Application to stay execution on appellant cannot be made *ex parte* (n). A demurrer had been decided against the defendants, and the plaintiffs were going to try issues of fact, and to tax the costs of demurrer. The defendants applied for a stay of proceedings pending an appeal. Archibald, J., said, "The rule formerly was, that there could not be more than one judgment in an action; there could not be separate judgments on issues of fact and issues of law. But under the Judicature Acts that, no doubt, is altered. It is not now, as it was formerly, considered of great importance to have only one taxation of costs. I shall make the order to stay till after the judgment of the Court of Appeal, and you can apply to the Court of Appeal if you have ground for asking for security." Order, all further proceedings to be stayed till after judgment of the Court of Appeal. Costs to be costs in the cause (o). The rule in *Merry v. Nickalls*, (L. R. 8 Ch. 205, 21 W. R. 305), is not altered by this rule, and on money ordered to be paid, being paid into Court, and costs of

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[RULE XV.]

[RULE XVI.]

Appeal no stay
of execution
except as may
be ordered.
Intermediate
act not invali-
dated, save as
by order.

Stay of execu-
tion not made
ex parte.

Where allowed
and where not.

(a) 4 Ch. D. 784; 46 L. J. (App.) Ch. D. 257; 35 L. T. N. S. 873; 25 W. R. 293.

(b) 5 Ch. 633; 25 W. R. 610.

(c) *Cummins v. Herron*, 4 Ch. D. 787; 46 L. J. Ch. D. 423; 36 L. T. N. S. 41; 25 W. R. 325; *White v. Witt*, 5 Ch. D. 589; 46 L. J. Ch. D. 560; 37 L. T. N. S. 110; 25 W. R. 435; *Reid v. Drake*, 21 S. J. 379.

(d) *Ante*, p. 463; 4 Ch. D. 785; 46 L. J. Ch. D. 330; 35 L. T. N. S. 917; 25 W. R. 310.

(e) *Ante*, p. 463; 4 Ch. D. 794; 46 L. J. Bankey., 80; 36 L. T. N. S. 43; 25 W. R. 364.

(f) 5 Ch. D. 61; 46 L. J. Bankey., 70; 36 L. T. N. S. 42; *ante*, p. 463.

(g) 20 S. J. 501; *ante*, p. 463.

(h) 21 S. J. 630; *ante*, p. 463.

(i) 5 Ch. D. 365; 36 L. T. N. S. 532; 25 W. R. 572; *ante*, pp. 452, 463.

(k) *Ante*, p. 349; 20 S. J. 584, 703; 21 S. J. 708.

(l) *Per Quain, J., Anon.*, 20 S. J. 101.

(m) *Southwell v. Rowditch*, W. N. 1876, 38; 20 S. J. 259.

(n) *Republic of Peru v. Weguelin*, 24 W. R. 297; 20 S. J. 292.

(o) *Grant v. Banque Franco-Égyptienne*, W. N. 1876, 74; 20 S. J. 298.

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[RULE XVI.]

Motion for stay
of execution
pending an
appeal.

the application paid, execution will be stayed pending appeal (a); but see *Morgan v. Elford*, post (f). The Common Pleas Division had made absolute a rule for a new trial, on the ground that a misapprehension of fact had inevitably led to a misdirection in point of law. On an application to stay proceedings on the ground that an appeal was intended which would, or might, render a new trial nugatory; notice of appeal had been given, the Court refused to stay the proceedings for a new trial (b).

In the case of the *Phosphate Sewage Co. v. Hartmont*, the facts of which are stated in the notes to the last foregoing rule, an application for stay of execution pending appeal was granted on condition of payment into Court within a week of £7,500, and payment of the costs of the application (c). Stay of execution was ordered pending appeal, on terms of the appealing defendant giving security to the satisfaction of the Judge in Chambers, for payment of money ordered to be paid (d). An action was commenced in October, 1873, in the Common Pleas; on the 18th November, 1875, judgment was given for the defendants; on the 23rd June, 1876, the Court of Appeal reversed the decision, and gave judgment for the plaintiffs for £4,500 and costs. The judgment was entered up and the costs taxed, and on the 21st July plaintiffs delivered to the sheriff a *fi. fa.*; on July 22nd a motion was made *ex parte* to the Court of Appeal to stay execution pending appeal to the Lords, and leave was given to serve short notice of motion. On the hearing on the notice, the Court held that the acts made no alteration in regard to the practice on appeal to the House of Lords. Upon appeal from the Common Law Divisions, the appellant could not have execution or judgment stayed, unless he gave bail as under the old practice. If the time for doing so could be extended under the Common Law Procedure Act, 1852, still the Court of Appeal had no jurisdiction in the matter. The division to which the action was attached alone could extend the time (e). An application was made to the Court of Appeal to stay proceedings under a decree pending appeal to the House of Lords. The bill had been by the Court of Appeal dismissed with costs, and the plaintiff's furniture had been seized by the sheriffs for costs. The plaintiff offered to pay £470, the value of the furniture, into Court, and to pay the balance of the costs within ten days, and asked that the sheriff might be ordered to withdraw. The Court held the practice was settled by *Merry v. Nickalls*, (L. R. 8 Ch. 205, 21 W. R. 305). The costs must be paid to the solicitor to whom they are due, he giving his personal undertaking to return them if the appeal be successful. *Cooper v. Cooper*, (2 Ch. Div. 492, 24 W. R. 628), was not against this rule, that being a case by consent. The plaintiff must settle with the sheriff, and the defendant's London agents, who were the solicitors on the record would give their personal undertaking to refund the amount actually paid them if the appeal were successful. Plaintiffs to pay the costs of this application (f). See on this rule, further, the case before cited, *Macleay v. Vaughan* (g).

[RULE XVII.]

When by rule,
application
ought to be
made to Court
or Judge below,
&c.

17. Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal, or to a Judge of the Court below or of the Court of Appeal,

(a) *Cooper v. Cooper*, 2 Ch. D. 492; 45 L. J. Ch. D. 667; 24 W. R. 628.(b) *Griffiths v. Taylor*, *Thatcher v. Taylor*, 20 S. J. 586.(c) *Ante*, p. 466; 2 Ch. D. 811; 20 S. J. 603; 21 S. J. 789.(d) *Vale v. Oppert*, 20 S. J. 860.(e) *Justice v. The Mersey Steel and Iron Co.*, 1 C. P. D. 575; 24 W. R. 955; 20 S. J. 762.(f) *Morgan v. Elford*, 4 Ch. D. 388; 25 W. R. 136; 21 S. J. 126.(g) *Ante*, p. 443; 20 S. J. 723.

it shall be made in the first instance to the Court or Judge below.

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[RULE XVII.]

Motions under this rule are original, and not appeal motions. With reference thereto, see cases before cited, *Maclean v. Vaughan* (a), and *Cooper v. Cooper* (b).

18. Every application to a Judge of the Court of Appeal shall be by motion, and the provisions of Order LIII. shall apply thereto.

[RULE XVIII.]

Applications to
Judge of Court
of Appeal by
motion under
Order LIII.

On hearing in Court of Appeal two counsel are heard on each side (c).

The notice hereinafter set out has been published with regard to the hearing of cases in the Court of Appeal.

“THE COURT OF APPEAL, AT LINCOLN’S INN.—NOTICE.

“The Senior Registrar has been directed to give notice that, in future, appeals from interlocutory orders in any of the following cases, will be set down for hearing in a separate list.

“1. On applications for injunctions, prohibitions, writs of ne exeat regno, or certiorari, and for stop orders on securities or documents in Court.

“2. On applications for and relating to the appointment of receivers, managers, or official liquidators.

“3. On applications for enlarging the time for redemption, for payment into Court, or for doing any other act, or for taking any proceedings.

“4. On applications relating to wards or infants and the management of their property.

“5. On applications relating to all matters of contempt and to the execution of decrees, judgments, and orders.

“6. On applications relating to the discovery and inspection of documents.

“7. And, generally, on all applications relating merely to matters of practice or procedure.

“The Solicitor applying to set down any appeal in such list will be required to produce his notice of motion and certify at the foot thereof the class to which it belongs.

“R. H. LEACH,

“Senior Registrar.

“CHANCERY REGISTRARS’ OFFICE,
“29th January, 1877.”

An additional order was promulgated to this order marked Order 58, Rule 19, and No. 16 of the Rules of the Supreme Court, December, 1875, but being found inconvenient, was repealed by the Rules of the Supreme Court, December, 1876, and the following passed in lieu thereof:—

(a) *Ante*, p. 443 ; 20 S. J. 723.

(b) *Supra*, p. 470 ; 2 Ch. D. 492 ; 45 L. J. Ch. D. 667 ; 24 W. R. 628.

(c) *Sneesby v. Lancashire and Yorkshire Co.*, 1 Q. B. D. 42.

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[RULE XIX.]

Every Judge of
High Court of
Justice to be a
Judge to hear
and determine
appeals from
inferior Courts,
&c.

19. Rule 16 of the Rules of the Supreme Court, December, 1875, is hereby repealed, and instead thereof the following provision shall take effect:—

Every Judge of the High Court of Justice for the time being shall be a Judge to hear and determine appeals from inferior Courts, under section 45 of the Supreme Court of Judicature Act, 1873. All such appeals (except Admiralty appeals from inferior Courts, which until further order shall be assigned as heretofore to the present Judge of the Admiralty Court,) shall be entered in one list by the officers of the Crown Office of the Queen's Bench Division; and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division, as the Presidents of those Divisions shall from time to time direct.

Nothing in this Order shall affect the validity of any Rule or Regulation heretofore issued with reference to such appeals by the Divisional Court formed under the said section.

Since the passing of this rule the following Orders with reference to it have been made:—

1. It is ordered that motions under the 6th section of 38 & 39 Vict. c. 50 (County Court Act) shall be made in the Queen's Bench, Common Pleas, or Exchequer Divisions only upon the day appointed for hearing appeals from Superior Courts (a), and no such motion shall be made by way of appeal from any county court unless a copy of the Judge's notes, signed by the Judge, shall have been handed to the proper officer in Court, unless otherwise ordered.

2. It is ordered that the party entering a special case under Order LVIII., Rule 19, at the Crown Office of the Queen's Bench Division, shall, four clear days before the day appointed for argument, deliver two copies of the case to the Judges of the Divisional Court to which such cause has been assigned for argument, at the Judges' Chambers in Rolls Gardens, Chancery Lane, such copies to be marked "for the use of the Judges in the Queen's Bench (Common Pleas or Exchequer) Division," and not with the name of any particular Judge, and to be divided into paragraphs, and numbered as in the special case, such copies to be forthwith forwarded to the proper Divisions at Westminster.

(a) This seems manifestly an error for "inferior Courts."

ORDER LIX.

Ord. 59.

EFFECT OF NON-COMPLIANCE.

Non-compliance with any of these Rules shall not render the proceedings in any action void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.

Non-compliance with rules shall not avoid proceedings unless by order, &c.

With reference to this Order see *Rolfe v. McLaren* (a).

ORDER LX.

Ord. 60.

OFFICERS.

1. All officers who at the time of the commencement of the said Act shall be attached to the Court of Chancery shall be attached to the Chancery Division of the said High Court; and all officers who at the time of the commencement of the said Act shall be attached to the Court of Queen's Bench shall be attached to the Queen's Bench Division of the said High Court; and all officers who at the time of the commencement of the said Act shall be attached to the Court of Common Pleas shall be attached to the Common Pleas Division of the said High Court; and all officers who at the time of the commencement of the said Act shall be attached to the Court of Exchequer shall be attached to the Exchequer Division of the said High Court; and all officers who at the time of the commencement of the said Act shall be attached to the Court of Probate, the Court of Divorce, and the Court of Admiralty respectively, shall be attached to the Probate, Divorce, and Admiralty Division of the said High Court.

[RULE I.]

Officers attached to Courts to be attached to divisions bearing same or analogous names.

Affidavits "in Chancery" sworn before "a Commissioner" to administer oaths in Chancery on the 3rd November, 1875, were directed to be filed notwithstanding the irregularity (b).

2. Officers attached to any division shall follow the appeals from the same division, and shall perform in the Court of Appeal analogous duties in reference to such appeals as the

[RULE II.]

Officers attached to divisions to follow appeals from those divisions, &c.

(a) *Ante*, p. 264; 3 Ch. D. 106; 24 W. R. 816.

(b) *Re Thomas*, W. N. 1875, 188; similar order in similar case, *Barwick v. Yeadon Local Board*, *ib.*, 189; 33 L. T. N. S. 322; 24 W. R. 23.

RULES OF
COURT.

Ord. 60.

[RULE II.]

registrars and officers of the Court of Chancery usually performed as to re-hearings in the Court of Appeal in Chancery, and as the Masters and officers of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively performed as to appeals heard by the Court of Exchequer Chamber.

Ord. 61.

ORDER LXI.

SITTINGS AND VACATIONS.

[RULE I.]

Duration of
Sittings of
Court of Ap-
peal, and in
London and
Middlesex of
High Court.

1. The sittings of the Court of Appeal and the sittings in London and Middlesex of the High Court of Justice shall be four in every year, viz., the Michaelmas sittings, the Hilary sittings, the Easter sittings, and the Trinity sittings.

The Michaelmas sittings shall commence on the 2nd of November and terminate on the 21st of December; the Hilary sittings shall commence on the 11th of January and terminate on the Wednesday before Easter; the Easter sittings shall commence on the Tuesday after Easter week and terminate on the Friday before Whitsunday.

The Trinity sittings shall commence on the Tuesday after Whitsun week and terminate on the 8th of August.

[RULE II.]

Number and
duration of
vacations.

2. The vacations to be observed in the several courts and offices of the Supreme Court shall be four in every year, viz., the Long vacation, the Christmas vacation, the Easter vacation, and the Whitsun vacation.

The Long vacation shall commence on the 10th of August and terminate on the 24th of October. The Christmas vacation shall commence on the 24th of December and terminate on the 6th of January.

The Easter vacation shall commence on Good Friday and terminate on Easter Tuesday, and the Whitsun vacation shall commence on the Saturday before Whitsunday and shall terminate on the Tuesday after Whitsunday.

[RULE III.]

All days named
inclusive.

3. The days of the commencement and termination of each sitting and vacation shall be included in such sitting and vacation respectively.

4. The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving.

RULES OF
COURT.

Ord. 61.

[RULE IV.]

Offices when to
be open.

The following order has been added by the rules of the Supreme Court, December, 1875 :—

4A. The offices of each District Registrar of the High Court of Justice shall be open on every day and hour in the year on which the offices of the Registrar of the County Court of the place in which the District Registry is situate are required to be kept open.

[RULE IVA.]

When office of
District Regis-
trar to be open.

And this has been supplemented as follows by the Rules of the Supreme Court of February, 1876, but (apparently by negligence) the latter rule, as will be seen, is also intituled 4A.

4A. The offices of the Supreme Court (including the Judges' Chambers) shall close on Saturdays at 2 o'clock.

[RULE IVA.]
Feb. 1876.

5. Two of the Judges of the High Court shall be selected at the commencement of each long vacation for the hearing in London or Middlesex during vacation of all such applications as may require to be immediately or promptly heard (a). Such two Judges shall act as vacation Judges for one year from their appointment. In the absence of arrangement between the Judges, the two vacation Judges shall be the two Judges last appointed (whether as Judges of the said High Court or of any Court whose jurisdiction is by the said Act transferred to the said High Court) who have not already served as vacation Judges of any such Court, and if there shall not be two Judges for the time being of the said High Court who shall not have so served, then the two vacation Judges shall be the Judge (if any) who has not so served and the senior Judge or Judges who has or have so served once only according to seniority of appointment, whether in the said High Court or such other Court as aforesaid. The Lord Chancellor shall not be liable to serve as a vacation Judge.

[RULE V.]

Two Judges to
be chosen at
beginning of
long vacation
as vacation
Judges for year,
&c.

(a) See, as to what has been held to be vacation business, 21 S. J. 829.

RULES OF
COURT.

[RULE VI.]

May sit separately or together as may be necessary to hear and dispose of all business, &c.

6. The vacation Judges may sit either separately or together as a Divisional Court as occasion shall require, and may hear and dispose of all actions, matters, and other business to whichever division the same may be assigned. No order made by a vacation Judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, or a Judge thereof, or the Judge who made the order. Any other Judge of the High Court may sit in vacation for any vacation Judge.

[RULE VII.]

At certain other times Vacation Judges may dispose of any urgent business.

7. The vacation Judges of the High Court may dispose of all actions, matters, and other business of an urgent nature during any interval between the sittings of any division of the High Court to which such business may be assigned, although such interval may not be called or known as a vacation.

The following rule has been added to this Order by the Rules of the Supreme Court of February, 1876, but again (apparently by negligence) the rule has been misintituled:—

[RULE X.]
Feb. 1876.

Hours during which official referees to sit daily, &c.

10. The Official Referees shall sit at least from 10 a.m. to 4 p.m. on every day during the Michaelmas, Hilary, Easter, and Trinity sittings of the High Court of Justice, except on Saturdays, during such sittings, when they shall sit, at least, from 10 a.m. to 2 p.m.; but nothing in this Rule shall prevent their sitting on any other days.

Ord. 62.

ORDER LXII.

EXCEPTIONS FROM THE RULES.

Nothing in these Rules shall affect the practice or procedure in any of the following causes or matters:—

Criminal proceedings:

Proceedings on the Crown side of the Queen's Bench Division:

Proceedings on the Revenue side of the Exchequer Division:

Proceedings for Divorce or other Matrimonial Causes.

With reference to criminal proceedings as regards this order, see *Reg. v. Steel (a)*; *Reg. v. Fletcher (b)*.

RULES OF
COURT.

Ord. 62.

ORDER LXIII.

Ord. 63.

INTERPRETATION OF TERMS.

The provisions of the 100th section of the Act shall apply to these Rules.

In the construction of these Rules, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following:—

“Person” shall include a body corporate or politic:

Under this rule “foreign corporation” may be made a defendant (*c*).

“Probate actions” shall include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business:

“Proper officer” shall, unless and until any Rule to the contrary is made, mean an officer to be ascertained as follows:

(*a*.) Where any duty to be discharged under the Act or these Rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same:

(*b*.) Where any new duty is under the Act or these Rules to be discharged, the proper officer to discharge the same shall be such officer, having previously discharged analogous duties, as may from time to time be directed to discharge the same, in the case of an officer of the Supreme Court, or the High Court of Justice, or the Court of Appeal, not attached to any division, by the Lord Chancellor, and in the case of an officer

(*a*) *Ante*, p. 70; 2 Q. B. D. 37; 46 L. J. M. C. 1; 35 L. T. N. S. 534; 25 W. R. 34.

(*b*) *Ante*, p. 70; 2 Q. B. D. 43; 46 L. J. M. C. 4; 35 L. T. N. S. 538; 25 W. R. 149.

(*c*) *Westman v. Snickarefabrik, &c.*, 1 Ex. D. 237; 45 L. J. Ex. D. 327; 24 W. R. 405; *ante*, p. 162.

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COURT.**Ord. 63.**

attached to any division, by the President of the division, and in the case of an officer attached to any Judge, by such Judge :

See with reference to this clause *Re Thomas* (a), and *Barwick v. Yeadon Local Board* (b).

"The Act" and "the said Act" shall respectively mean the Supreme Court of Judicature Act, 1873, as amended by this Act.

The interpretation given by this clause is extended to the Rules of the Supreme Court (costs), O. VI., r. 4, *post*, p. 561, and to the Orders, October 28, 1875. See r. 8, *post*, p. 587.

(a) W. N. 1875, 188, *ante*, p. 473.

(b) W. N. 1875, 189 ; 33 L. T. N. S. 322 ; 24 W. R. 23.

FORMS.

APPENDIX (A).

PART I.

FORMS OF WRITS OF SUMMONS, &c.

No. 1.

[No. I.]

187 . [Here put the letter and number.] Title in full.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and E.F. Defendants.

See O. 2, R. 3.

VICTORIA, by the grace of God, &c.

To *C.D.* of in the county of and *E.F.* of

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of Our High Court of Justice in an action at the suit of *A.B.*; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, &c.

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within (*twelve*) calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The defendant [*or defendants*] may appear hereto by entering an appearance [*or appearances*] either personally or by solicitor at the [] office at

Indorsements to be made on the writ before issue thereof.

The plaintiff's claim is for, &c.

This writ was issued by *E.F.*, of solicitor for the said plaintiff, who resides at , or, this writ was issued by the plaintiff in person who resides at [*mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any.*]

Indorsement to be made on the writ after service thereof.

This writ was served by *X.Y.* on *L.M.* [the defendant or one of the defendants], on Monday, the day of , 18 .
(Signed) *X.Y.*

APPENDIX A

p. I.

Forms.

APPENDIX A
p. I.

No. 2.

Forms.*Writ for service out of the jurisdiction, or where the notice in lieu of service is to be given out of the jurisdiction.*

[No. II.]

187 . [Here put the letter and number.]

In the High Court of Justice.
Division.Between A.B. Plaintiff,
and
C.D. and E.F. Defendants.

VICTORIA, by the grace of God, &c.

To C.D. of

O. 2, R. 5.

We command you, C.D., That within [here insert the number of days directed by the Court or Judge ordering the service or notice] after the service of this writ [or notice of this writ, as the case may be] on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of our High Court of Justice in an action at the suit of A.B.; and take notice, that in default of your so doing the plaintiff may, ~~by leave of the Court or a Judge~~ (a), proceed therein, and judgment may be given in your absence. Witness, &c.

*Memoranda and Indorsements as in Form No. 1.**Indorsement to be made on the writ before the issue thereof.**N.B.—This writ is to be used where the Defendant or all the Defendants or one or more Defendant or defendants is or are out of the jurisdiction.*

No. 3.

[No. III.]

Notice of Writ in lieu of service to be given out of the jurisdiction.

187 . [Here put the letter and number.]

Between A.B. Plaintiff,
and

C.D., E.F., and G.H. Defendants.

O. 2, R. 5.

To G.H., of

Take notice, that A.B., of has commenced an action against you, G.H., in the Division of Her Majesty's High Court of Justice in England, by writ of that Court, dated the day of , A.D. 18 ; which writ is indorsed as follows [copy in full the indorsements], and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action; and in default of your so doing, the said A.B. may, ~~by leave of the Court or a Judge~~ (a), proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the [] office at

(Signed) A.B. of &c.

X.Y. of or &c.

Solicitor for A.B.

In the High Court of Justice.
Division.

(a) The words struck through in the Form were in the case of *Baker v. Turner*, ordered to be omitted, and these words have since been expunged from the Form in all cases by O. II., r. 3a, passed by the rules of the Supreme Court, June, 1876. See the case of *Baker v. Turner*, 24 W. R. 637, sub nom. *Bacon v. Turner*, 3 Ch. D. 275; 34 L. T. N. S. 647; and *Scott v. The Royal Wax Candle Co.*, 1 Q. B. D. 404; 45 L. J. Q. B. D. 586; 34 L. T. N. S. 683; 24 W. R. 668; ante, p. 157.

No. 4.

APPENDIX A
p. I.

Form (a), in Appendix to Orders of the Supreme Court, December, 1875, has been substituted for this form :—

Forms.

(See O. II. r. 7a.) The form is as follows :—

No. 4 (a).

[No. IV. (a).]

Writ of Summons in Admiralty action in rem.

O. 2, R. 7A.

187 . [Here put the letter and number.]

In the High Court of Justice.

Admiralty Division.

Between A.B., plaintiff,

and

The Owners of the

VICTORIA, by the Grace of God, &c.

To the owners and parties interested in the ship or vessel
of the port of [or cargo, &c., as the case may be].

We command you, that within eight days after the service of this writ, inclusive of the day of such service, you do cause an appearance to be entered for you in the Admiralty Division of our High Court of Justice in an action at the suit of A.B.; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day of 18 .

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be served within (twelve) calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The defendant (or defendants) may appear hereto by entering an appearance (or appearances) either personally or by solicitor at the [] office at

Indorsements to be made on the Writ before Issue thereof.

The plaintiff's claim is for, &c.

This writ was issued by E.F., of , solicitor for the said plaintiff, who resides at , or, this writ was issued by the plaintiff in person, who resides at [mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any.]

Indorsement to be made on the Writ after Service thereof.

This writ was served by X.Y. [here state the mode in which the service was effected, whether on the owner, or on the ship, cargo, or freight, according to Order IX., Rules 10, 11, and 12, as the case may be] on the day of 18 .

Signed, X.Y.

No. 5.

[No. V.]

Form of Memorandum for renewed Writ.

In the High Court of Justice.

O. 8, R. 1.

Division.

Between A.B., plaintiff,

and

C.D., defendant.

Seal renewed writ of summons in this action indorsed as follows :—

[Copy original writ and the indorsements.]

APPENDIX A
p. I.**Forms.**[No. VI.]
O. 12, R. 10.High Court of Justice.
[Chancery] Division.**No. 6.***Memorandum of Appearance.*

187 . [Here put the letter and number.]

*A.B. v. C.D., and others.*Enter an appearance for
in this action.

Dated this day of

X.Y.,

Solicitor for the Defendant.

The place of business of *X.Y.* is
His address for service is*or [C.D.,*
Defendant in person.The address of *C.D.* is
His address for service isThe said defendant [requires, *or*, does not require] a statement of com-
plaint *to be filed* and delivered (*a*).**No. 7.**

[Here put the letter and number.]

[No. VII.]
O. 12, R. 22.In the High Court of Justice.
Queen's Bench (*or* Chancery, C.P., *or*, &c.) Division.
Between *A.B.*, plaintiff,
and
C.D., and
E.F., defendants.The defendant *C.D.* limits his defence to part only of the property
mentioned in the writ in this action, that is to say, to the close called "the
Big field."

Yours, &c.

*G.H.,*Solicitor for the said defendant *C.D.*To Mr. *X.Y.*, plaintiff's solicitor.*(a)* There seems no authority for requiring the filing mentioned in this Form,
see **O. XIX., rr. 2, 6.**

PART II.

SECTION I.

GENERAL INDORSEMENTS.

In Matters assigned by the 34th Section of the Act to the Chancery Division.

1. *Creditor to administer Estate.*

The plaintiff's claim is as a creditor of *X.Y.*, of _____ deceased, to have the [real and] personal estate of the said *X.Y.* administered. The defendant *C.D.* is sued as the administrator of the said *X.Y.* [and the defendants *E.F.* and *G.H.* as his co-heirs-at-law] (a). O. 3, R. 3.

2. *Legatee to administer Estate.*

The plaintiff's claim is as a legatee under the will dated the _____ day of _____ 18____, of *X.Y.* deceased, to have the [real and personal estate of the said *X.Y.* administered. The defendant *C.D.* is sued as the executor of the said *X.Y.* [and the defendants *E.F.* and *G.H.* as his devisees]. O. 3, R. 3.

3. *Partnership.*

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and defendant [under articles of partnership dated the _____ day of _____], and to have the affairs of the partnership wound up. O. 3, R. 3.

4. *By Mortgagee.*

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs on a mortgage dated the _____ day of _____ made between _____ [or by deposit of title deeds], and that the mortgage may be enforced by foreclosure or sale. O. 3, R. 3.

5. *By Mortgagor.*

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated _____ and made between [parties], and to redeem the property comprised therein. O. 3, R. 3.

6. *Raising Portions.*

The plaintiff's claim is that the sum of _____ l., which by an indenture of settlement dated _____, was provided for the portions of the younger children of _____ may be raised. O. 3, R. 3.

(a) As to this Form, see note on **O. III., r. 3**, and cases there cited: *Cooper v. Blisset*, 1 Ch. D. 691; 45 L. J. Ch. D. 272; 24 W. R. 235; *Worraker v. Pryor*, 2 Ch. D. 109; 45 L. J. Ch. D. 273; 24 W. R. 269; *Fryer v. Wiseman*, 20 S. J. 292; *Adcock v. Peters*, W. N. 1876, 139; 20 S. J. 451; *Eyre v. Cox*, 24 W. R. 317; 20 S. J. 311; *In re Royle*, 5 Ch. D. 540; 36 L. T. N. S. 441; 25 W. R. 528. Query whether the indorsement would not be improved by adding after the word "administered" the words "on behalf of himself and all the other creditors of the said *X.Y.*"

APPENDIX A
p. II, s. 1.**Forms.**

O. 3, R. 3.

The plaintiff's claim is to have the trusts of an indenture dated and made between carried into execution.

7. *Execution of Trusts.*

O. 3, R. 3.

The plaintiff's claim is to have a deed dated and made between [parties], set aside or rectified.

8. *Cancellation or Rectification.*

O. 3, R. 3.

The plaintiff's claim is for specific performance of an agreement dated the day of , for the sale by the plaintiff to the defendant of certain [freehold] hereditaments at

9. *Specific Performance.*

[SECT. II.]

SECTION II.

See as to these forms, Order Aug. 12, 1875. O. 6, R. 1.

Money Claims where no Special Indorsement under Order III., Rule 6.

Goods sold.

The plaintiff's claim is l. for the price of goods sold.
[This Form shall suffice whether the claim be in respect of goods sold and delivered, or of goods bargained and sold.]

Money lent.

The plaintiff's claim is l. for money lent [and interest].

Several demands.

The plaintiff's claim is l., whereof l. is for the price of goods sold, and l. for money lent, and l. for interest.

Rent.

The plaintiff's claim is l. for arrears of rent.

Salary, &c.

The plaintiff's claim is l. for arrears of salary as a clerk [or as the case may be].

Interest.

The plaintiff's claim is l. for interest upon money lent.

General average.

The plaintiff's claim is l. for a general average contribution.

Freight, &c.

The plaintiff's claim is l. for freight and demurrage.

Tolls.

The plaintiff's claim is l. for lighterage.

Penalties.

The plaintiff's claim is l. for market tolls and stallage.

The plaintiff's claim is l. for penalties under the Statute [. . .].

Banker's balance.

The plaintiff's claim is l. for money deposited with the defendant as a banker.

Fees, &c., as solicitors.

The plaintiff's claim is l. for fees for work done [and l. for money expended] as a solicitor.

Commission.

The plaintiff's claim is l. for commission earned as [state character, as auctioneer, cotton broker, &c.].

Medical attendance &c.

The plaintiff's claim is l. for medical attendances.

Return of premium.

The plaintiff's claim is l. for a return of premiums paid upon policies of insurance.

Warehouse rent.

The plaintiff's claim is l. for the warehousing of goods.

Carriage of goods.

The plaintiff's claim is l. for the carriage of goods by railway.

Use and occupation of houses.

The plaintiff's claim is l. for the use and occupation of a house.

Hire of goods.

The plaintiff's claim is l. for the hire of [furniture].

Work done.

The plaintiff's claim is l. for work done as a surveyor.

Board and lodging.

The plaintiff's claim is l. for board and lodging.

Schooling.

The plaintiff's claim is l. for the board, lodging, and tuition of X. Y.

Money received.

The plaintiff's claim is l. for money received by the defendant as solicitor [or factor, or collector, or, &c.] of the plaintiff.

Fees of office.

The plaintiff's claim is l. for fees received by the defendant under colour of the office of .

Money overpaid.

The plaintiff's claim is l. for a return of money over-charged for the carriage of goods by railway.

The plaintiff's claim is l. for a return of fees over-charged by the defendant as

The plaintiff's claim is the defendant as stakeholder.

The plaintiff's claim is as stakeholder, and become payable to plaintiff.

The plaintiff's claim is defendant as agent of the plaintiff.

The plaintiff's claim is the plaintiff by fraud.

The plaintiff's claim is defendant by mistake.

The plaintiff's claim is defendant for [*work to be done, left undone; or, a bill to be taken up; not taken up, or, &c.*].

The plaintiff's claim is upon shares to be allotted.

The plaintiff's claim is surety.

The plaintiff's claim is defendant.

The plaintiff's claim is [*indorsed*] for the defendant's accommodation.

The plaintiff's claim is paid by the plaintiff as surety.

The plaintiff's claim is debt of the plaintiff and the defendant, paid by the plaintiff.

The plaintiff's claim is against which the defendant was bound to indemnify the plaintiff.

The plaintiff's claim is for money payable under an award.

The plaintiff's claim is life of X.Y., deceased.

The plaintiff's claim is and interest.

The plaintiff's claim is in the Empire of Russia.

The plaintiff's claim is dant.

The plaintiff's claim is [*drawn or indorsed*] by the defendant.

The plaintiff's claim is [*dorsed*] by the defendant.

The plaintiff's claim is acceptor, and against the defendant C.D. as drawer [*or indorser*] of a bill of exchange.

The plaintiff's claim is price of goods sold.

The plaintiff's claim is principal, and against the defendant C.D. as surety, for the price of goods sold [*or arrears of rent, or for money lent, or for money received by the defendant A.B. as traveller for the plaintiffs, or, &c.*].

The plaintiff's claim is agent for the price of goods sold [*or as losses under a policy*].

The plaintiff's claim is for calls upon shares.

The plaintiff's claim is for crops, tillage, manure [*or as the case may be*] left by the defendant as outgoing tenant of a farm.

l. for a return of money deposited with

l. for money entrusted to the defendant

l. for a return of money entrusted to the

l. for a return of money obtained from

l. for a return of money paid to the de-

l. for a return of money paid to the de-

l. for a return of money paid as a deposit

l. for money paid for the defendant as his

l. for money paid for rent due by the

l. upon a bill of exchange accepted [*or*

l. for a contribution in respect of money

l. for a contribution in respect of a joint

l. for money paid for calls upon shares,

l. for money payable under an award.

l. upon a policy of insurance upon the

l. upon a bond to secure payment of 1000*l.*,

l. upon a judgment of the Court

l. upon a cheque drawn by the defen-

l. upon a bill of exchange accepted [*or*

l. upon a promissory note made [*or in-*

l. against the defendant A.B. as ac-

l. against the defendant C.D. as drawer [*or indorser*] of a bill of

l. against the defendant as surety for the Surety.

l. against the defendant A.B. as prin-

l. against the defendant C.D. as surety, for the price of goods

l. against the defendant as a *del credere*

l. for calls upon shares.

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

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l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

l. for crops, tillage, manure [*or as the case*

APPENDIX A
p. II., s. 2.

Forms.

Return of money by stakeholder.

Money won from stakeholder.

Money entrusted to agent.

Money obtained by fraud.

Money paid by mistake.

Money paid for consideration which has failed.

Money paid by surety for defendant.

Rent paid.

Money paid on accommodation bill.

Contribution by surety.

By co-debtor.

Money paid for calls.

Money payable under award.

Life policy.

Money bond.

Foreign judgment.

Bills of exchange, &c.

Del credere agent.

Calls.

Waygoing crops, &c.

SECTION III.

[SECT. III.]

Indorsement for Costs, &c. [add to the above Forms].

And l. for costs; and if the amount claimed be paid to the plaintiff or his solicitor within four days [*or if the writ is to be served out of the jurisdiction, or notice in lieu of service allowed, insert the time for appearance limited by the order*] from the service hereof, further proceedings will be stayed. O. 3, R. 7.

APPENDIX A
p. II, s. 4.**Forms.**

[SECT. IV.]

See also as to these forms, Order Aug. 12, 1875. O. 6, R. 1. Agent, &c.

Apprentices.

Arbitration.

Assault, &c.

By husband and wife.

Against husband and wife.

Solicitor.

Bailment.

Pledge.

Hire.

Banker.

Bill.

Bond.

Carrier.

Charter-party.

Claim for return of goods ; damages.

Damages for depriving of goods.

Defamation.

Distress.

Replevin.

Wrongful distress.

Ejectment.

SECTION IV.

Damages and other Claims.

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff as traveller.

The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller [*and l. for arrears of wages*].

The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager.

The plaintiff's claim is for damages for breach of duty as factor [*or, &c.*] of the plaintiff [*and l. for money received as factor, &c.*].

The plaintiff's claim is for damages for breach of the terms of a deed of apprenticeship of X.Y. to the defendant [*or plaintiff*].

The plaintiff's claim is for damages for non-compliance with the award of X.Y.

The plaintiff's claim is for damages for assault [*and false imprisonment, and for malicious prosecution*].

The plaintiff's claim is for damages for assault and false imprisonment of the plaintiff C.D.

The plaintiff's claim is for damages for assault by the defendant C.D.

The plaintiff's claim is for damages for injury by the defendant's negligence as solicitor of the plaintiff.

The plaintiff's claim is for damages for negligence in the custody of goods [*and for wrongfully detaining the same*].

The plaintiff's claim is for damages for negligence in the keeping of goods pawned [*and for wrongfully detaining the same*].

The plaintiff's claim is for damages for negligence in the custody of furniture lent on hire [*or a carriage lent*], [*and for wrongfully, &c.*].

The plaintiff's claim is for damages for wrongfully neglecting [*or refusing*] to pay the plaintiff's cheque.

The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.

The plaintiff's claim is upon a bond conditioned not to carry on the trade of a

The plaintiff's claim is for damages for refusing to carry the plaintiff's goods by railway.

The plaintiff's claim is for damages for refusing to carry the plaintiff by railway.

The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of coals by railway.

The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of machinery by sea.

The plaintiff's claim is for damages for breach of charter-party of ship [*Mary*].

The plaintiff's claim is for return of household furniture, or, &c., or their value, and for damages for detaining the same.

The plaintiff's claim is for wrongfully depriving plaintiff of goods, household furniture, &c.

The plaintiff's claim is for damages for libel.

The plaintiff's claim is for damages for slander.

The plaintiff's claim is in replevin for goods wrongfully distrained.

The plaintiff's claim is for damages for improperly distraining.

[*This Form shall be sufficient whether the distress complained of be wrongful or excessive, or irregular, and whether the claim be for damages only, or for double value.*]

The plaintiff's claim is to recover possession of a house, No. in street, or of a farm called Blackacre, situate in the parish of in the county of

The plaintiff's claim is to establish his title to [*here describe property*], and to recover the rents thereof. APPENDIX A
p. II., s. 4.

[*The two previous Forms may be combined.*]

Forms.

To establish title
and recover
rents.
Dower.
Fishery.
Fraud.

The plaintiff's claim is for dower.

The plaintiff's claim is for damages for infringement of the plaintiff's right of fishing.

The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse [*or a business, or shares, or, &c.*].

The plaintiff's claim is for damages for fraudulent misrepresentation of the credit of *A.B.*

The plaintiff's claim is for damages for breach of a contract of guarantee for *A.B.* Guarantee.

The plaintiff's claim is for damages for breach of a contract to indemnify the plaintiff as the defendant's agent to distrain.

The plaintiff's claim is for a loss under a policy upon the ship "*Royal Charter*," and freight or cargo [*or for return of premiums*]. Insurance.

[*This Form shall be sufficient whether the loss claimed be total or partial.*]

The plaintiff's claim is for a loss under a policy of fire insurance upon house and furniture. Fire insurance.

The plaintiff's claim is for damages for breach of a contract to insure a house.

The plaintiff's claim is for damages for breach of contract to keep a house in repair. Landlord and tenant.

The plaintiff's claim is for damages for breaches of covenants contained in a lease of a farm.

The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man. Medical man.

The plaintiff's claim is for damages for injury by the defendant's dog. Mischievous animal.

The plaintiff's claim is for damages for injury to the plaintiff [*or, if by husband and wife, to the plaintiff, C.D.*] by the negligent driving of the defendant or his servants. Negligence.

The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway by the negligence of the defendant's servants.

The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station, from the defective condition of the station.

The plaintiff's claim is as executor of *A.B.* deceased, for damages for the death of the said *A.B.*, from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants. Lord Campbell's Act.

The plaintiff's claim is for damages for breach of promise of marriage.

Promise of marriage.

The plaintiff's claim is in quare impedit for

Quare impedit.
Seduction.

The plaintiff's claim is for damages for the seduction of the plaintiff's daughter.

The plaintiff's claim is for damages for breach of contract to accept and pay for goods. Sale of goods.

The plaintiff's claim is for damages for non-delivery [*or short delivery, or defective quality, or other breach of contract of sale*] of cotton [*or, &c.*].

The plaintiff's claim is for damages for breach of warranty of a horse.

The plaintiff's claim is for damages for breach of a contract to sell [*or purchase*] land. Sale of land.

The plaintiff's claim is for damages for breach of a contract to let [*or take*] a house.

The plaintiff's claim is for damages for breach of a contract to sell [*or purchase*] the lease, with goodwill, fixtures, and stock in trade of a public-house.

The plaintiff's claim is for damages for breach of covenant for title [*or for quiet enjoyment, or, &c.*] in a conveyance of land.

The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [*or cutting his grass, or pulling*]. Trespass to land.

APPENDIX A
p. II., s. 4.**Forms.**

Support.

Way.

Watercourse, &c.

Pasture.

Light.

Sporting.

Patent.

Copyright.

Trade mark.

Work.

Nuisance.

Innkeeper.

Mandamus.

Injunction.

Mesne profits.

Arrears of rent.

Breach of
Covenant.

down his timber, or pulling down his fences, or removing his gate, or using his road or path, or crossing his field, or depositing sand there, or carrying away gravel from thence, or carrying away stones from his river.]

The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [*or house, or mine.*]

The plaintiff's claim is for damages for wrongfully obstructing a way [*public highway or a private way.*]

The plaintiff's claim is for damages for wrongfully diverting [*or obstructing, or polluting, or diverting water from*] a watercourse.

The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [*or into the plaintiff's mine.*]

The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.

The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture.

[This Form shall be sufficient whatever the nature of the right to pasture be.]

The plaintiff's claim is for damages for obstructing the access of light to plaintiff's house.

The plaintiff's claim is for damages for the infringement of the plaintiff's right of sporting.

The plaintiff's claim is for damages for the infringement of the plaintiff's patent.

The plaintiff's claim is for damages for the infringement of the plaintiff's copyright.

The plaintiff's claim is for damages for wrongfully using [*or imitating*] the plaintiff's trade mark.

The plaintiff's claim is for damages for breach of a contract to build a ship [*or to repair a house, &c.*].

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff to build a ship, &c.

The plaintiff's claim is for damages to his house, trees, crops, &c., caused by noxious vapours from the defendant's factory [*or, &c.*].

The plaintiff's claim is for damages from nuisance by noise from the defendant's works [*or stables, or, &c.*].

The plaintiff's claim is for damages for loss of the plaintiff's goods in the defendant's inn.

Add to Indorsement:—

And for a mandamus.

Add to Indorsement:—

And for an injunction.

Add to Indorsement where claim is to land, or to establish title, or both.

And for mesne profits.

And for an account of rents or arrears of rent.

And for breach of covenant for [*repairs*].

[SECT. V.]

SECTION V.

*Probate.*1. *By an executor or legatee propounding a will in solemn form.*

The plaintiff claims to be executor of the last will dated the _____ day of _____ of C.W., late of _____ Gentleman, deceased, who died on the _____ day of _____ and to have the said will established. This writ is issued against you as one of the next of kin of the said deceased [*or as the case may be*].

2. *By an executor or legatee of a former will, or a next of kin, &c., of the deceased seeking to obtain the revocation of a Probate granted in common form.*

Forms.

The plaintiff claims to be executor of the last will dated the
day of _____ of *C.D.*, late of _____ Gentleman,
deceased, who died on the _____ day of _____ and
to have the probate of a pretended will of the said deceased, dated the
_____ day of _____ revoked. This writ is issued
against you as the executor of the said pretended will [*or as the case
may be*].

3. *By an executor or legatee of a will when letters of administration have been granted as in an intestacy.*

The plaintiff claims to be executor of the last will of *C.D.*, late of
_____ Gentleman, deceased, who died on the
day of _____ dated the _____ day of _____

The plaintiff claims that the grant of letters of administration of the personal estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

4. *By a person claiming a grant of administration as a next of kin of the deceased, but whose interest as next of kin is disputed.*

The plaintiff claims to be the brother and sole next of kin of *C.D.* of
_____ Gentleman, deceased, who died on the
day of _____ intestate, and to have as such a grant of adminis-
tration to the personal estate of the said intestate. This writ is issued
against you because you have entered a caveat, and have alleged that
you are the sole next of kin of the deceased [*or as the case may be*].

(g.) SECTION VI.

[SECT. VI.]

*Admiralty.*1. *Damage to vessel by collision.*

The plaintiffs as owners of the vessel "*Mary*," of the port of _____
claim 1000*l.* against the brig or vessel "*Jane*" for damage occasioned
by a collision, which took place in the North Sea in the month of May
last.

2. *Damage to cargo by collision.*

The plaintiffs as owners of the cargo laden on board the vessel "*Mary*,"
of the port of _____, claim £ _____ against the vessel "*Jane*,"
for damage done to the said cargo in a collision in the North Sea in the
month of May last.

[*The two previous forms may be combined.*]

3. *Damage to cargo otherwise.*

The plaintiff as owner of goods laden on board the vessel "*Mary*," on
a voyage from Lisbon to England, claims from the owner of the said
vessel £ _____ for damage done to the said goods during such voyage.

4. *In causes of possession.*

The plaintiff as sole owner of the vessel "*Mary*," of the port of _____
claims to have possession decreed to him of the said
vessel.

5. The plaintiff claims possession of the vessel "*Mary*," of the port of _____
of _____ as owner of 48-64th shares of the said vessel against
C.D., owner of 16-64th shares of the said vessel.

6. The plaintiff as part owner of the vessel "*Mary*," claims against *C.D.*,
part owner and his shares in the said vessel £ _____ as part of the earn-
ings of the said vessel due to plaintiff.

APPENDIX A
p. II., s. 6.**Forms.**

7. The plaintiff as owner of 48-64th shares of the vessel "Mary," of the port of _____, claims possession of the said brig as against *C.D.* the master thereof.

8. The plaintiff under a mortgage, dated the _____ day of _____ claims against the vessel "Mary," £ _____, being the amount of his mortgage thereon, and £ _____ for interest.

9. The plaintiff as assignee of a bottomry bond, dated the _____ day of _____, and granted by *C.D.* as master of the vessel "Mary," of the port of _____, to *A.B.*, at St. Thomas's, in the West Indies, claims £ _____ against the vessel "Mary" and the cargo laden thereon.

10. *By a part owner of a vessel.*

The plaintiff as owner of 24-64th shares of the vessel "Mary," being dissatisfied with the management of the said vessel by his co-owners, claims that his co-owners shall give him a bond in £ _____ for the value of the plaintiff's said shares in the said vessel.

11. The plaintiffs as owners of the derelict vessel "Mary," of the port of _____, claim to be put in possession of the said vessel and her cargo.

12. *By salvors.*

The plaintiffs as the owners, master, and crew of the vessel "Caroline," of the port of _____, claim the sum of £ _____ for salvage services performed by them to the vessel "Mary," off the Goodwin Sands, on the _____ day of _____.

13. *Claim for Towage.*

The plaintiffs as owners of the steam-tug "Jane," of the port of _____ claim £ _____ for towage services performed by the said steam-tug to the vessel "Mary," on the _____ day of _____.

14. *Seamen's Wages.*

The plaintiffs as seamen on board the vessel "Mary," claim £ _____ for wages due to them, as follows (1), the mate 30*l.* for two months' wages from the _____ day of _____.

15. *For Necessaries.*

The plaintiffs claim £ _____ for necessaries supplied to the vessel "Mary," at the port of Newcastle-on-Tyne, delivered on the _____ day of _____ and the _____ day of _____.

[SECT. VII.]

SECTION VII.

See Order
Aug. 12, 1875,
O. 6, R. 1.

Special Indorsements under Order III., Rule 6 (a).

1. The plaintiff's claim is for the price of goods sold. The following are the particulars:—

1873—31st December.—

Balance of account for butcher's meat to this	£	s.	d.
date	35	10	0

1874—1st January to 31st March.—

Butcher's meat supplied	74	5	0
-----------------------------------	----	---	---

	109	15	0
--	-----	----	---

1874—1st February.—Paid	45	0	0
-----------------------------------	----	---	---

Balance due .	£64	15	0
---------------	-----	----	---

(a) As to these indorsements see note to O. III., r. 6., p. 170.

2. The plaintiff's claim is against the defendant *A.B.* as principal and against the defendant *C.D.* as surety, for the price of goods sold to *A.B.* The following are the particulars :—
1874—2nd February. Guarantee by *C.D.* of the price of woollen goods, to be supplied to *A.B.*

APPENDIX A
p. II., s. 7.
Forms.
O. 6, R. 1.

	£	s.	d.
2nd February—To goods	47	15	0
3rd March—To goods	105	14	0
17th March—To goods	14	12	0
5th April—To goods	34	0	0
	202	1	0

3. The plaintiff's claim is against the defendant, as maker of a promissory note. The following are the particulars :—
Promissory note for 250*l.*, dated 1st January, 1874, made by defendant, payable four months after date.

	£
Principal	250
Interest	

4. The plaintiff's claim is against the defendant *A.B.* as acceptor, and against the defendant *C.D.* as drawer, of a bill of exchange. The following are the particulars :—
Bill of exchange for 500*l.*, dated 1st January, 1874, drawn by defendant *C.D.* upon and accepted by defendant *A.B.*, payable three months after date.

	£
Principal	500
Interest	

5. The plaintiff's claim is for principal and interest due upon a bond. The following are the particulars :—
Bond dated 1st January, 1873. Condition for payment of 100*l.* on the 26th December, 1873.

	£
Principal due	50
Interest	

6. The plaintiff's claim is for principal and interest due under a covenant. The following are the particulars :—
Deed dated covenant to pay 100*l.* and interest.

	£
Principal due	80
Interest	

SECTION VIII.

[SECT. VIII.]

Indorsements of Character of Parties.

The plaintiff's claim is as executor [*or administrator*] of *C.D.*, deceased, for, &c. O. 3, R. 4.

The plaintiff's claim is against the defendant *A.B.*, as executor [*or, &c.*] of *C.D.*, deceased, for, &c.

APPENDIX A
p. II., s. 8.**Forms.**

O. 3, R. 4.

The plaintiff's claim is against the defendant *A.B.*, as executor of *X.Y.*, deceased, and against the defendant *C.D.*, in his personal capacity, for, &c.

By husband and wife, executrix.

The claim of the plaintiff *C.D.* is as executrix of *X.Y.*, deceased, and the claim of the plaintiff *A.B.* as her husband, for

Against husband and wife, executrix.

The claim of the plaintiff is against the defendant *C.D.*, as executrix of the defendant *C.D.*, deceased, and against the defendant *A.B.*, as her husband, for

Trustee in bankruptcy.

The plaintiff's claim is as trustee under the bankruptcy of *A.B.*, for

The plaintiff's claim is against the defendant as trustee under the bankruptcy of *A.B.*, for

Trustees.

The plaintiff's claim is as [or the plaintiff's claim is against the defendant as] trustee under the will of *A.B.* [or under the settlement upon the marriage of *A.B.* and *X.Y.*, his wife].

Public officer

The plaintiff's claim is as public officer of the Bank, for

The plaintiff's claim is against the defendant as public officer of the Bank, for

The plaintiff's claim is against the defendant *A.B.* as principal, and against the defendant *C.D.* as public officer of the Bank, as surety, for

Heir and devisee.

The plaintiff's claim is against the defendant as heir-at-law of *A.B.*, deceased.

The plaintiff's claim is against the defendant *C.D.* as heir-at-law, and against the defendant *E.F.* as devisee of lands under the will of *A.B.*

Qui tam action.

The plaintiff's claim is as well for the Queen as for himself, for

Forms.

APPENDIX (B).

Form 1.

[FORM I.]

Notice by Defendant to Third Party.

O. 16, R. 18.

187 . [*Here put the letter and number.*]
 Notice filed , 187 .

In the High Court.

Queen's Bench Division.

Between *A.B.*, plaintiff,
 and
C.D., defendant.

To Mr. *X.Y.*

Take notice that this action has been brought by the plaintiff against the defendant [as surety for *M.N.*, upon a bond conditioned for payment of 2,000*l.* and interest to the plaintiff.

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are [his co-surety under the said bond, *or*, also surety for the said *M.N.*, in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the day of , A.D.].

Or [as acceptor of a bill of exchange for 500*l.*, dated the day of , A.D. , drawn by you before and accepted by the defendant, and payable three months after date.

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation.]

Or [to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1,000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent].

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant *C.D.*, you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing, you will not be entitled in any future proceeding between the defendant *C.D.* and yourself to dispute the validity of the judgment in this action, whether obtained by consent or otherwise.

(Signed) *E.T.*

Or,
X.Y.,

Solicitor for the defendant,
E.T.

Appearance to be entered at

Form 2.

[FORM II.]

187 . [*Here put the letter and number.*] O. 20, R. 3

In the High Court.

Queen's Bench Division.

Between *A.B.*, plaintiff,
 and
C.D., defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence [*or*, of the defendant's further statement of defence].

APPENDIX B

Form 3.

Forms.

[FORM III.]

O. 21, R. 4.

In the High Court of Justice.
Division.187. [*Here put the letter and number.*]Between *A.B.*, plaintiff,
and
C.D., defendant.

The particulars of the plaintiff's complaint herein, and of the relief and remedy to which he claims to be entitled, appear by the indorsement upon the writ of summons.

[FORM IV.]

O. 22, R. 6.

Form 4.

"To the within-named *X.Y.*

"Take notice that if you do not appear to the within counterclaim of the within-named *C.D.* within eight days from the service of this defence and counter-claim upon you, you will be liable to have judgment given against you in your absence.

"Appearances are to be entered at

."

[FORM V.]

O. 30, R. 2.

Form 5.

*Notice of Payment into Court.*In the High Court of Justice.
Q.B. Division.

187 . B. No.

A.B. v. C.D.

Take notice that the defendant has paid into Court £ , and says that that sum is enough to satisfy the plaintiff's claim [*or the plaintiff's claim for, &c.*]

To Mr. *X.Z.*,

the Plaintiff's Solicitor.

Z.,

Defendant's Solicitor.

[FORM VI.]

O. 30, R. 4.

Form 6.

*Acceptance of Sum paid into Court.*In the High Court of Justice.
Q.B. Division.

187 . B. No.

A.B. v. C.D.

Take notice that the plaintiff accepts the sum of £ paid by you into Court in satisfaction of the claim in respect of which it is paid in.

Form 7.

APPENDIX B

Forms.

[FORM VII.]

O. 31, R. 3.

In the High Court of Justice.
Division.

187 . B. No.

Between *A.B.*, plaintiff,
and
C.D., *E.F.*, and *G.H.*, defendants.

Interrogatories on behalf of the above-named [*plaintiff*, or *defendant C.D.*] for the examination of the above-named [*defendants E.F. and G.H.*, or *plaintiff*].

1. Did not, &c.
2. Has not, &c.
&c. &c. &c.

[*The defendant E.F. is required to answer the interrogatories numbered .*]

[*The defendant G.H. is required to answer the interrogatories numbered .*]

Form 8.

[FORM VIII.]

Form of Answer to Interrogatories.

In the High Court of Justice.
Division.

187 . B. No. O 31, R. 7.

Between *A.B.*, plaintiff,
and
C.D., *E.F.*, and *G.H.*, defendants.

The answer of the above-named defendant *E.F.* to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named *E.F.*, make oath and say as follows :—

.....
.....

Form 9.

[FORM IX.]

Form of Affidavit as to Documents.

O. 31, R. 13.

In the High Court of Justice.
Division.

187 . B. No.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

I, the above-named defendant *C. D.*, make oath and say as follows :—

1. I have in my possession or power the documents relating to the

APPENDIX B

Forms.

O. 31, R. 13.

matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

[FORM X.]

Form 10.*Form of Notice to produce Documents.*

O. 31, R. 15.

In the High Court of Justice.
Q. B. Division.

A.B. v. C.D.

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim, or defence, or affidavit, dated the day of* A.D.].

*Describe documents required.**X.Y.,**Solicitor to the*

To Z.,
Solicitor for

[FORM XI.]

Form 11.*Form of Notice to inspect Documents.*

O. 31, R. 16.

In the High Court of Justice.
Q.B. Division.

A.B. v. C.D.

Take notice that you can inspect the documents mentioned in your notice of the A.D. day of [except the deed] numbered in that notice] at my office on Thursday next the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of the documents mentioned in your notice of the day of A.D. , on the ground that [*state the ground*] :—

Form 12.*Form of Notice to admit Documents.*

In the High Court of Justice.

Division.

A.B. v. C.D.

APPENDIX B

Forms.

[FORM XII.]

O. 32, R. 3.

Take notice that the plaintiff [*or defendant*] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*], his solicitor or agent, at _____, on _____, between the hours of _____

; and the defendant [*or plaintiff*] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

To *E.F.*, solicitor [*or agent*] for defendant [*or plaintiff*].*G.H.*, solicitor [*or agent*] for plaintiff [*or defendant*]

[*Here describe the documents, the manner of doing which may be as follows:—*]

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between <i>A.B.</i> and <i>C.D.</i> first part, and <i>E.F.</i> second part	January 1, 1848.
Indenture of lease from <i>A.B.</i> to <i>C.D.</i>	February 1, 1848.
Indenture of release between <i>A.B.</i> , <i>C.D.</i> first part, &c.	February 2, 1848.
Letter—defendant to plaintiff	March 1, 1848.
Policy of insurance on goods by ship " <i>Isabella</i> ," on voyage from Oporto to London	December 3, 1847.
Memorandum of agreement between <i>C.D.</i> , captain of said ship, and <i>E.F.</i>	January 1, 1848.
Bill of exchange for £100 at three months, drawn by <i>A.B.</i> on and accepted by <i>C.D.</i> , indorsed by <i>E.F.</i> and <i>G.H.</i>	May 1, 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered when, how, and by whom.
Register of baptism of <i>A.B.</i> in the parish of <i>X.</i>	January 1, 1848.	
Letter—plaintiff to defendant	February 1, 1848.	Sent by General Post, February 2, 1848.
Notice to produce papers	March 1, 1848.	Served March 2, 1848, on defendant's attorney by <i>E.F.</i> of—
Record of a Judgment of the Court of Queen's Bench in an action, <i>J.S. v. J.N.</i>	Trinity Term, 10th Vict.	
Letters Patent of King Charles II. in the Rolls Chapel	January 1, 1680.	

APPENDIX B

Forms.

[FORM XIII.]

O. 34, R. 5.

In the High Court of Justice.
Division.**Form 13.**
Setting down Special Case.

187 . B. No.

Between *A.B.*, plaintiff,
and
C.D. and others, defendants.Set down for argument the special case filed in this action on the
day of , 187 .*X.Y.*, Solicitor for

[FORM XIV.]

O. 36, R. 8.

In the High Court of Justice.
Division.**Form 14.***Form of Notice of Trial.**A.B. v. C.D.*Take notice of trial of this action [*or of the issues in this action ordered to be tried*] by a Judge and jury [*or as the case may be*] in Middlesex, [*or as the case may be*] for the day of next.*X.Y.*, plaintiff's Solicitor [*or as the case may be*].

Dated

To *Z.*, defendant's Solicitor [*or as the case may be*].

[FORM XV.]

O. 36, R. 24.

30th November, 1876.
In the High Court of Justice.
Division.**Form 15.***Form of Certificate of Officer after Trial by a Jury.*

1876. No.

Between *A.B.*, plaintiff,
and
C.D., defendant.I certify that this action was tried before the Honourable Mr. Justice
and a special jury of the county of
on the 12th and 13th days of November, 1876.The jury found [*state findings*].The Judge directed that judgment should be entered for the plaintiff for
l. with costs of summons [*or as the case may be*].*A.B.*,
[Title of Officer.]

[FORM XVI.]

O. 21, R. 2.

In the High Court of Justice.
Probate Division.**Form 16.***Affidavit of Scripts.*Between *A.B.* . . . Plaintiff,
and*C.D.* . . . Defendant.I, *A.B.* of , in the county of
party in this cause, make oath and say, that no paper or parchment writing,

APPENDIX B

Forms.

O. 21, R. 2.

being or purporting to be or having the form or effect of a will or codicil or other testamentary disposition of *E.F.*, late of _____, in the county of _____, deceased, the deceased in this cause, or being or purporting to be instructions for, or the draft of, any will, codicil, or testamentary disposition of the said *E.F.*, has at any time, either before or since his death, come to the hands, possession, or knowledge of me, this deponent, or to the hands, possession, or knowledge of my solicitors in this suit, so far as is known to me, this deponent, save and except the true and original last will and testament of the said deceased now remaining in the principal registry of this Court [*or hereunto annexed, or as the case may be*], the said will bearing date the _____ day of _____

18 _____ [*or as the case may be*], also save and except [*here add the dates and particulars of any other testamentary papers of which the deponent has any knowledge*].

Sworn at

on the

(Signed)

A.B.

day of

18 .

Before me,

[*Person authorised to administer oaths under the Act.*]

APPENDIX C

Forms.

APPENDIX (C).

No. 1.

187 . B. No.

[No. I.]

ACCOUNT
STATED.

O. 19, R. 4.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1875.

Between *A.B.* Plaintiff,
and
E.F. Defendant.*Statement of Claim.*

Claim.

1. Between the 1st of January and the 28th of February, 1875, the plaintiff supplied to the defendant various articles of drapery; and accounts and invoices of the goods so supplied, and their prices, were from time to time furnished to the defendant, and payments on account were from time to time made by the defendant.

2. On the 28th of February, 1875, a balance remained due to the plaintiff of £75 9s., and an account was on that day sent by the plaintiff to the defendant showing that balance.

3. On the 1st of March following, the plaintiff's collector saw the defendant at his house, and asked for payment of the said balance, and the defendant then paid him by cheque £25 on account of the same. The residue of the said balance, amounting to £50 9s., has never been paid.

The plaintiff claims £

The plaintiff proposes that this action should be tried in the county of Northampton.

No. 2.

[1876. † B. No. 233.]

[No. II.]

ADMINISTRA-
TION OF
ESTATE.

O. 19, R. 4.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

Writ issued 22d December, 1876.

(a) In the matter of the estate of *A.B.*, deceased.
Between *E.F.* Plaintiff,
and
G.H. Defendant.

Statement of Claim.

Claim.

O. 19, R. 4.

1. *A.B.* of *K.*, in the county of *L.*, died on the 1st of July, 1875, intestate. The defendant *G.H.* is the administrator of *A.B.*

2. *A.B.* died entitled to lands in the said county for an estate of fee simple, and also to some other real estate and to personal estate. The defendant has entered (b) possession of the real estate of *A.B.*, and received the rents thereof. The legal estate in such real estate is outstanding in (c) mortgages under mortgages created by the intestate.

3. *A.B.* was never married; he had one brother only, who predeceased him without having been married, and two sisters only, both of whom also pre-deceased him, namely *M.N.* and *P.Q.* The plaintiff is the only child of *M.N.*, and the defendant is the only child of *P.Q.*

(a) See *Eyre v. Cox*, 24 W. R. 317. The testator's name ought also to govern the reference to the record in administration suits (see above †) though form No. 4, *post*, p. 503, would lead to the inference that the name of the plaintiff ought to be the guide.

(b) The word *into* is clearly here omitted.

(c) This word is clearly a misprint for "mortgagees."

APPENDIX C

Forms.

O. 19, R. 4.

The plaintiff claims—

1. To have the real and personal estate of *A.B.* administered in this court, and for that purpose to have all proper directions given and accounts taken.
2. To have a receiver appointed of the rents of his real estate.
3. Such further or other relief as the nature of the case may require.

With regard to the first clauses of this prayer, on examining the statements in the Form, it seems very doubtful if any ground is laid therein for such claims as regards the real estate; the plaintiff seems as to the real estate merely a co-partner with the defendant, and the statement of claim is not for a partition.

[1876. B. No. 233.] O. 19, R. 4.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]In the matter of the estate of *A.B.*, deceased.Between *E.F.* Plaintiff,

and

G.H. Defendant.*Statement of Defence.*

1. The plaintiff is an illegitimate child of *M.N.* She was never married. Defence.
2. The intestate was not entitled to any real estate at his death, except a copyhold estate situate in the county of *R.*, and held of the manor of *S.* According to the custom of that manor, when the copyholder dies without issue, and without leaving a brother, or issue of a deceased brother, the copyhold descends to his elder sister and her issue in preference to his younger sister and her issue. *P.Q.* was older than *M.N.*
3. The personal estate of *A.B.* was not sufficient for the payment of his debts, and has all been applied in payment of his funeral and testamentary expenses, and part of his debts.

[1876. B. No. 233.] O. 19, R. 4.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]In the matter of the estate of *A.B.*, deceased.Between *E.F.* Plaintiff,

and

G.H. Defendant.*Reply.*

The plaintiff joins issue with the defendant upon his defence.

Reply.

No. 3.

[1876. B. No. 234.]

[No. III.]

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

Writ issued 22nd December, 1876.

(a) In the matter of the estate of *A.B.*, deceased.Between *E.F.* Plaintiff,

and

G.H. Defendant.

(b).

1. *A.B.* of *K.*, in the county of *L.*, duly made his last will, dated the Claim.

O. 19, R. 4.

(a) See *Eyre v. Cox*, 24 W. R. 317; 20 S. J. 311.

(b) The words "Statement of claim" seem here omitted without any sufficient reason.

APPENDIX C

Forms.

O. 19, R. 4.

1st day of March, 1873, whereby he appointed the defendant and *M.V.* (who died in the testator's lifetime) executors thereof, and devised and bequeathed his real and personal estate to and to the use of his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain 21, or a daughter who should attain that age, or marry, upon trust as to his real estate for the person who would be the testator's heir-in-law, and as to his personal estate for the persons who would be the testator's next of kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The testator died on the 1st day of July, 1873, and his will was proved by the defendant on the 4th of October, 1873. The plaintiff has not been married.

3. The testator was at his death entitled to real and personal estate; the defendant entered into the receipt of the rents of the real estate and got in the personal estate; he has sold some part of the real estate.

The plaintiff claims—

1. To have the real and personal estate of *A.B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken.
2. Such further or other relief as the nature of the case may require.

O. 19, R. 4.

[1876. B. No. 234.]

In the High Court of Justice.
Chancery Division.

[*Name of Judge.*]

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* Plaintiff,
and
G.H. Defendant.

Statement of Defence.

Defence.

1. *A.B.*'s will contained a charge of debts; he died insolvent; he was entitled at his death to some real estate which the defendant sold, and which produced the net sum of £4300, and the testator had some personal estate which the defendant got in, and which produced the net sum of £1204. The defendant applied the whole of the said sums and the sum of £84 which the defendant received from rents of the real estate in the payment of the funeral and testamentary expenses and some of the debts of the testator. The defendant made up his accounts and sent a copy thereof to the plaintiff on the 10th of January, 1875, and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer. The defendant submits that the plaintiff ought to pay the costs of this action.

[1876. B. No. 234.]

In the High Court of Justice.
Chancery Division.

[*Name of Judge.*]

In the matter of the estate of *A.B.*, deceased.

Between *E.F.* Plaintiff,
and
G.H. Defendant.

Reply.

Reply.

The plaintiff joins issue with the defendant upon his defence.

No. 4.

(a) [1876. B. No. 235.]

APPENDIX C

Forms.

[No. IV.]

O. 19, R. 4.

In the High Court of Justice.
Chancery Division.

[Name of Judge.]

In the matter of the estate of *W.H.*, deceased.

Writ issued 22nd December, 1876.

Between *A.B.* and *C.* his wife Plaintiffs,
and
E.F. and *G.H.* Defendants.

Statement of Claim.

1. W. H., of H., in the county of L., duly made his last will, dated the 19th day of March, 1861, whereby he appointed the defendants the executors thereof, and bequeathed to them all his personal estate in trust, to call in, sell, and convert the same into money, and thereout to pay his debts and funeral and testamentary expenses, and to divide the ultimate surplus into three shares, and to pay one of such three shares to each of his two children, T. H., and D., the wife of E. W., and to stand possessed of the remaining third share upon trust for the children of the testator's son J. H. in equal shares, to be divided among them when the youngest of such children should attain the age of 21 years. And the testator devised his real estates to the defendants upon trust until the youngest child of the said J. H. should attain the age of 21 years, to pay one third part of the rents thereof to the said T. H., and one other third part thereof to the said E. W., and to accumulate the remaining third part by way of compound interest, and so soon as the youngest child of the said J. H. should attain the age of 21 years, to sell the said real estates, and out of the proceeds of such sale to pay the sum of 1,000*l.* to the said T. H., and to invest one moiety of the residue in manner therein mentioned, and stand possessed thereof in trust to pay the income thereof to the said E., the wife of the said E. W., during her life for her separate use, and after her death for her children, the interests of such children being contingent on their attaining the age of 21 years, and to divide the other moiety of such proceeds of sale and the accumulations of the third share of rents therein-before directed to be accumulated among such of the children of the said J. H. as should be then living, and the issue of such of them as should be then dead, in equal shares per stirpes.

2. The testator died on the 25th day of April, 1873, and his said will was proved by the defendants in the month of June, 1873.

3. The testator died possessed of one third share in a leasehold colliery called the Paradise Colliery, and in the engines, machinery, stock in trade, book debts, and effects belonging thereto. He was also entitled to real estate, and other personal estate.

4. The testator left T. H. and E., the wife of E. W., him surviving. J. H. had died in the testator's lifetime, leaving four children, and no more. The plaintiff C. B. is the youngest of the children of J. H., and attained the age of 21 years on the 1st of June, 1871. The other three children of J. H. died without issue in the lifetime of the testator.

5. E. W. has several children, but no child has attained the age of 21 years.

6. T. H. is the testator's heir-at-law.

7. The defendants have not called in, sold, and converted into money the whole of the testator's personal estate, but have allowed a considerable part thereof to remain outstanding ; and in particular the defendants have not called in, sold, or converted into money the testator's interest in the said colliery, but have, from the death of the testator to the present time, continued to work the same in partnership with the other persons interested therein. The estate of the testator has sustained considerable loss by reason of such interest not having been called in, sold, or converted into money.

(a) See note, *ante*, p. 500.

APPENDIX C

Forms.

O. 19, R. 4.

8. The defendants did not upon the death of the testator sell the testator's furniture, plate, linen, and china, but allowed the testator's widow to possess herself of a great part thereof, without accounting for the same, and the same has thereby been lost to the testator's estate.

9. The defendants have not invested the share of the testator's residuary personal estate given by his will to the children of the testator's son J. H., and have not accumulated one third of the rents and profits of his real estate as directed by the said will, but have mixed the same share and rents with their own moneys, and employed them in business on their own account.

10. The defendants have sold part of the real estates of the testator, but a considerable part thereof remains unsold.

11. A receiver ought to be appointed of the outstanding personal estate of the testator, and the rents and profits of his real estate remaining unsold.

The plaintiffs claim :—

1. That the estate of the said testator may be administered, and the trusts of his will carried into execution under the direction of the court.
2. That it may be declared that the defendants, by carrying on the business of the said colliery instead of realising the same, have committed a breach of trust, and that the parties interested in the testator's estate are entitled to the value of the testator's interest in the said partnership property as it stood at the testator's death, with interest thereon, or at their election to the profits which have been made by the defendants in respect thereof since the testator's death, whichever shall be found most for their benefit.
3. That an account may be taken of the interest of the testator in the said colliery, and in the machinery, book debts, stock, and effects belonging thereto, according to the value thereof at the testator's death, and an account of all sums of money received by or by the order, or for the use of the defendants, or either of them, on account of the testator's interest in the said colliery, and that the defendants may be ordered to make good to the estate of the testator the loss arising from their not having realised the interest of the testator in the said colliery within a reasonable time after his decease.
4. That an account may be taken of all other personal estate of the testator come to the hands of the defendants, or either of them, or to the hands of any other person by their or either of their order, or for their or either of their use, or which, but for their wilful neglect or default, might have been so received ; and an account of the rents and profits of the testator's real estate, and the moneys arising from the sale thereof, possessed or received by or by the order, or for the use of the defendants, or either of them.
5. That the real estate of the testator remaining unsold may be sold under the direction of the court.
6. That the defendants may be decreed, at the election of the parties interested in the testator's estate, either to pay interest at the rate of 5*l.* per cent. per annum upon such moneys belonging to the estate of the testator as they have improperly mixed with their own moneys and employed in business on their own account, and that half-yearly rests may be made in taking such account as respects all moneys which by the said will were directed to be accumulated, or to account for all profits by the employment in their business of the said trust money.
7. That a receiver may be appointed of the outstanding personal estate of the testator, and to receive the rents and profits of his real estate remaining unsold.
8. Such further or other relief as the nature of the case may require.

[1876. B. 235.]

APPENDIX C

In the High Court of Justice.
Chancery Division.

[Name of Judge.]

Forms.

O. 19, R. 4.

(a).
Between A.B. and C. his wife Plaintiffs,
and
E.F. and G.H. Defendants.

Statement of Defence of the above-named Defendants.

1. Shortly after the decease of the testator, the defendants, as his executors, possessed themselves of and converted into money the testator's personal estate, except his share in the colliery mentioned in the plaintiff's statement of claim. The moneys so arising were applied in payment of part of the testator's debts and funeral and testamentary expenses, but such moneys were not sufficient for the payment thereof in full. Defence.

2. The Paradise Colliery was, at the testator's decease, worked by him in partnership with J. Y., and W. Y., and T. Y., both since deceased. No written articles of partnership had been entered into, and for many years the testator had not taken any part in the management of the said colliery, but it was managed exclusively by the other partners, and the defendants did not know with certainty to what share therein the testator was entitled.

3. Upon the death of the testator, the defendants endeavoured to ascertain the value of the testator's share in the colliery, but the other partners refused to give them any information. The defendants thereupon had the books of the colliery examined by a competent accountant, but they had been so carelessly kept that it was impossible to obtain from them any accurate information respecting the state of the concern; it was, however, ascertained that a considerable sum was due to the testator's estate.

4. Between the death of the testator and the beginning of the year 1874 the defendants made frequent applications to J. Y., W. Y., and T. Y. for a settlement of the accounts of the colliery. Such applications having proved fruitless, the defendants, in January, 1874, filed their bill of complaint in the Court of Chancery against J. Y., W. Y., and T. Y., praying for an account of the partnership dealings between the testator and the defendants thereto, and that the partnership might be wound up under the direction of the Court.

5. The said T. Y. died in the year 1874, and the suit was revived against J. P. and T. S., his executors. The suit is still pending.

6. As to the Paradise Colliery, the defendants have acted to the best of their judgment for the benefit of the testator's estate, and they deny being under any liability in respect of the said colliery not having been realised. They submit to act under the direction of the Court as to the further prosecution of the said suit and generally as to the realisation of the testator's interest in the said colliery.

7. With respect to the statements in the eighth paragraph of the statement of claim, the defendants say, that upon the death of the testator, they sold the whole of his furniture, linen, and china, and also all his plate, except a few silver teaspoons of very small value, which were taken possession of by his widow, and they applied the proceeds of such sale as part of the testator's personal estate, and they deny being under any liability in respect of such furniture, linen, china, and plate.

8. With respect to the statements in paragraph seven of the statement of claim, the defendants say that all moneys received by them, or either of them, on account of the testator's estate, were paid by them to their executorship account at the bank of Messrs. H. and Co., and until the sale of the testator's real estate took place as hereinafter mentioned, the balance to their credit was never greater than was necessary for the administration

(a) It is not to be inferred from this precedent that in the title of a statement of defence in an administration action the words "In the matter of the estate of deceased" should be omitted.

APPENDIX C

Forms.

O. 19, R. 4.

of the trusts of the testator's will, and they therefore were unable to make any such investment or accumulation as directed by the testator's will. No moneys belonging to the testator's estate have ever been mixed with the moneys of the defendants, or either of them, nor has any money of the testator's been employed in business since the testator's decease, except that his share in the said colliery, for the reason hereinbefore appearing, has not been got in.

9. In 1874, after the plaintiff *C.B.* had attained her age of 21 years, the defendants sold the real estate of the testator for sums amounting to 15,080*l.*, and no part thereof remains unsold. They received the purchase moneys in December, 1874, and on the day of , 1875, they paid such proceeds into Court to the credit of this action with the exception of 500*l.*, retained on account of costs incurred and to be incurred by them.

In the High Court of Justice.
Chancery Division.

[1876. B. No. 235.]

[*Name of Judge.*]

Between *A.B.* and *C.* his wife Plaintiffs,
and
E.F. and *G.H.* Defendants.

Reply.

The plaintiff joins issue with the defendants upon their defence.

[No. V.]

No. 5.

In the High Court of Justice,
Division.

187 . B. No.

Writ issued 3rd August, 1875.

Between *A.B.* and Company Plaintiffs,
and
E.F. and Company Defendants.

Statement of Claim.

Claim.

O. 19, R. 4.

1. The plaintiffs are manufacturers of artificial manures, carrying on business at , in the county of .

2. The defendants are commission agents, carrying on business in London.

3. In the early part of the year , the plaintiffs commenced, and down to the , 187 , continued to consign to the defendants, as their agents, large quantities of their manures for sale, and the defendants sold the same, and received the price thereof and accounted to the plaintiffs therefor.

4. No express agreement has ever been entered into between the plaintiffs and the defendants with respect to the terms of the defendants' employment as agents. The defendants have always charged the plaintiffs a commission at per cent. on all sales effected by them, which is the rate of commission ordinarily charged by *del credere* agents in the said trade. And the defendants, in fact, always accounted to the plaintiffs for the price, whether they received the same from the purchasers or not.

5. The plaintiffs contend that the defendants are liable to them as *del*

credere agents, but if not so liable are under the circumstances hereinafter mentioned liable as ordinary agents. APPENDIX C

Forms.

O. 19, R. 4.

6. On the _____, the plaintiffs consigned to the defendants for sale a large quantity of goods, including _____ tons of _____

7. On or about the _____, the defendants sold _____ tons of _____ part of such goods to one *G.H.* for _____ l., at three months credit, and delivered the same to him.

8. *G.H.* was not, at that time, in good credit and was in insolvent circumstances, and the defendants might, by ordinary care and diligence, have ascertained the fact.

9. *G.H.* did not pay for the said goods, but before the expiration of the said three months for which credit had been given was adjudicated a bankrupt, and the plaintiffs have never received the said sum of _____ l. or any part thereof.

The plaintiffs claim :—

1. Damages to the amount of _____ l.

2. Such further or other relief as the nature of the case may require.

The plaintiffs propose that this action should be tried in the county of _____

[Title as in claim, omitting date of issue of writ.]

Statement of Defence.

1. The defendants deny that the said commission of _____ per cent. mentioned in paragraph 4 of the claim is the rate of commission ordinarily charged by *del credere* agents in the said trade, and say that the same is the ordinary commission for agents other than *del credere* agents, and they deny that they ever accounted to the plaintiffs for the price of any goods, except after they had received the same from the purchasers. Defence.

2. The defendants deny that they were ever liable to the plaintiff as *del credere* agents.

3. With respect to the eighth paragraph of the plaintiff's statement of claim, the defendants say that at the time of the said sale to the said *G.H.*, the said *G.H.* was a person in good credit. If it be true that the said *G.H.* was then in insolvent circumstances (which the defendants do not admit), the defendants did not and had no reason to suspect the same, and could not by ordinary care or diligence have ascertained the fact.

[Title as in defence.]

Reply.

The plaintiffs join issue upon the defendants' statement of defence.

Reply.

No. 6.

[No. VI.]

In the High Court of Justice.
Division.

187 . B. No.

BILL OF
EXCHANGE.
O. 19, R. 4.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* Plaintiffs,
and
E.F. and *G.H.* Defendants.

Statement of Claim.

1. Messrs. *M.N. & Co.* on the _____ day of _____ drew a bill of exchange upon the defendants for _____ l. payable to the order of the said Messrs. *M.N. & Co.* three months after date, and the defendants accepted the same. Claim.

2. Messrs. *M.N. & Co.* indorsed the bill to the plaintiffs.

APPENDIX C

Forms.

O. 19, R. 4.

3. The bill became due on the
the defendant has not paid it.

The plaintiffs claim :—

[Title].

Statement of Defence.

Defence.

1. The bill of exchange mentioned in the statement of claim was drawn and accepted under the circumstances hereinafter stated, and except as hereinafter mentioned there never was any consideration for the acceptance or payment thereof by the defendants.

2. Shortly before the acceptance of the said bill it was agreed between the said Messrs. *M.N. & Co.*, the drawers thereof, and the defendants, that the said Messrs. *M.N. & Co.* should sell and deliver to the defendants free on board ship at the port of _____, 1,200 tons of coals during the month of _____, and that the defendants should pay for the same by accepting the said Messrs. *M.N. & Co.*'s draft for _____ l. at six months.

3. The said Messrs. *M.N. & Co.* accordingly drew upon the defendants, and the defendants accepted the bill of exchange now sued upon.

4. The defendants did all things which were necessary to entitle them to delivery by the said Messrs. *M.N. & Co.* of the said 1,200 tons of coals under their said contract, and the time for delivery has long since elapsed; but the said Messrs. *M.N. & Co.* never delivered the same, or any part thereof, but have always refused to do so, whereby the consideration for the defendants' acceptance has wholly failed.

5. The plaintiffs first received the said bill, and it was first indorsed to them after it was overdue.

6. The plaintiffs never gave any value or consideration for the said bill.

7. The plaintiffs took the said bill with notice of the facts stated in the second, third, and fourth paragraphs hereof.

[Title.]

Reply.

Reply.

1. The plaintiff joins issue upon the defendants' statement of defence.

2. The plaintiff gave value and consideration for the said bill in manner following, that is to say, on the _____ day of _____

187____, the said Messrs. *M.N. & Co.* were indebted to the plaintiff in about _____ l., the balance of an account for goods sold from time to time by him to them. On that day they ordered of the plaintiff further goods to the value of about _____ l., which last-mentioned goods have since been delivered by him to them. And at the time of the order for such last-mentioned goods it was agreed between Messrs. *M.N. & Co.* and the plaintiff, and the order was received upon the terms, that they should indorse and hand over to him the bill of exchange sued upon, together with various other securities on account of the said previous balance, and the price of the goods so ordered on that day. The said securities, including the bill sued upon, were thereupon on the same day indorsed and handed over to the plaintiff (a).

(a) In the case of *Earp v. Henderson*, 3 Ch. D. 254; 45 L. J. Ch. D. 738; 34 L. T. N. S. 844, this form was decided to be erroneous in containing at the same time a joinder of issue and a special replication; but the decision in this case is rendered more than doubtful by the subsequent decision of the Court of Appeal in *Hall v. Eve*, 4 Ch. D. 341; 46 L. J. Ch. D. 145; 35 L. T. N. S. 926; 25 W. R. 177.

No. 7.

187 . B. No.

APPENDIX C

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* Plaintiffs,
and
E.F. and *G.H.* Defendants.*Statement of Claim.***Forms.**

[No. VII.]

BILL OF
EXCHANGE
AND CON-
SIDERATION.O. 19, R. 4.
Claim.

1. The plaintiffs are merchants' factors, and commission agents, carrying on business in London.

2. The defendants are merchants and commission agents, carrying on business at Hong Kong.

3. For several years prior to the 1875, the plaintiffs had been in the habit of consigning goods to the defendants for sale, as their agents, and the defendants had been in the habit of consigning goods to the plaintiffs for sale, as their agents; and each party always received the price of the goods sold by him for the other; and a balance was from time to time struck between the parties, and paid.

On the of , the moneys so received by the defendants for the plaintiffs, and remaining in their names, largely exceeded the moneys received by the plaintiffs for the defendants, and a balance of £. was accordingly due to the plaintiffs from the defendants.

4. On or about the 1875, the plaintiffs sent to the defendants a statement of the accounts between them showing the said sum as the balance due to the plaintiffs from the defendants; and the defendants agreed to the said statement of accounts as correct, and to the said sum of £. as the balance due by them to the plaintiffs, and agreed to pay interest on such balance if time were given to them.

5. The defendants requested the plaintiffs to give them three months time for payment of the said sum of £., and the plaintiffs agreed to do so upon the defendants accepting the bills of exchange hereinafter mentioned.

6. The plaintiffs thereupon on the drew two bills of exchange upon the defendants, one for £. and the other for £., both payable to the order of the plaintiffs three months after date, and the defendants accepted the bills.

The said bills became due on the 187 , and the defendants have not paid the bills, or either of them, nor the said sum of £.

The plaintiffs claim:—

£. and interest to the date of judgment.

The plaintiffs propose that the action should be tried in London.

No. 8.

187 . B. No.

[No. VIII.]

In the High Court of Justice.
Division.

Writ issued [].

[THE "IDA"] (a).

Between *A.B.* and *C.D.* Plaintiffs,
and
E.F. and *G.H.* Defendants.

(a) In Admiralty action insert name of ship.

O. 19, R. 4.

APPENDIX C

Forms.

O. 19, R. 4.
Claim.

Statement of Claim.

[1. The "Ida" is a vessel of which no owner or part owner was, at the time of the institution of this cause, domiciled in England or Wales.] (a)

2. In the month of February, 1873, Messrs. L. and Company, of Alexandria, caused to be shipped 6,110 ardebs of cotton seed on board the said vessel, then lying in Port Said (Egypt), and the then master of the vessel received the same, to be carried from Port Said to Hull, upon the terms of three bills of lading, signed by the master, and delivered to Messrs. L. and Company.

3. The three bills of lading, being in form exactly similar to one another, were and are, so far as is material to the present case, in the words, letters, and figures following, that is to say :—

"Shipped in good order and well conditioned by L. & Co. Alexandria
" (Egypt) in and upon the good ship called the 'Ida,' whereof is master
" for the present voyage Ambrozio Chiapella, and now riding at anchor
" in the port of Port Said (Egypt) and bound for Hull, six thousand
" one hundred and ten ardebs cotton seed being marked and numbered
" as in the margin, and are to be delivered in the like good order and
" well-conditioned at the aforesaid Port of Hull (the act of God, the
" Queen's enemies, fire and all and every other dangers and accidents
" of the seas, rivers, and navigation of whatever nature and kind
" soever, save risk of boats so far as ships are liable to excepted), unto
" order or to assigns paying freight for the said goods at the rate
" of (19s.) say nineteen shillings sterling in full per ton of 20 cwt.
" delivered with £10 gratuity. Other conditions as per charter-party,
" dated London, 4th October, 1872, with primage and average accus-
" tomed. In witness whereof the master or purser of the said ship
" hath affirmed to three bills of lading all of this tenor and date,
" the one of which three bills being accomplished the other two to
" stand void. Dated in Port Said (Egypt) 6th February, 1873. 100
" dunnage mats. Fifteen working days remain for discharging" (b).

4. The persons constituting the firm of Messrs. L. and Company are identical with the members of the plaintiffs' firm.

5. The vessel sailed on her voyage to Hull, and duly arrived there on or about the 7th day of May, 1873.

6. The cotton seed was delivered to the plaintiffs, but not in as good order and condition as it was in when shipped at Port Said; but was delivered to the plaintiffs greatly damaged.

7. The deterioration of the cotton seed was not occasioned by any of the perils or causes in the bills of lading excepted.

8. By reason of the premises the plaintiffs lost a great part of the value of the said cotton seed, and were put to great expense in and about keeping, warehousing, and improving the condition of the said cotton seed, and in and about having the same surveyed.

The plaintiffs claim the following relief :—

1. *l.* for damages, [(c) and the condemnation of the said vessel and the defendant and his bail in the same] :
2. Such further relief as the nature of the case requires.

[Title.]

Defence.

Statement of :—

Defence.

1. They deny the truth of the allegations contained in the sixth, seventh, and eighth articles of the said petition.

(a) A statement to this effect may be inserted if the action be under sect. 6 of the Admiralty Act, 1861.

(b) This clause is hardly in accordance with the suggestions of O. XIX., r. 24.

(c) This may be inserted if the action be an Admiralty action in rem.

2. The deterioration, if any, to the cotton seed was occasioned by the character and quality of the cotton seed when shipped on board the "Ida," and by the inherent qualities of the cotton seed, and by shipping water in a severe storm which occurred on the day of in latitude during the voyage, or by some or one of such causes.

APPENDIX C

Forms.

O. 19, R. 4.

[Title.]

Reply.

The plaintiffs join issue upon the statement of defence.

Reply.

No. 9.

[No. IX.]

187 . B. No.

In the High Court of Justice.
Admiralty Division.BOTTOMRY.
O. 19, R. 4.

Writ issued [].

THE "ONWARD."

Between *A.B.* and *C.D.* Plaintiffs,
and
E.F. and *G.H.* Defendants.

Statement of Claim.

1. The "Onward," a ship of 933 tons register, or thereabouts, belonging to the United States of America, whilst on a voyage from Moulmein to Queenstown or Falmouth, for orders, and from thence to a port of discharge in the United Kingdom or on the Continent, between Bordeaux and Hamburg, both ports inclusive, laden with a cargo of teak timber, was compelled to put into Port Louis, in the island of Mauritius, in order to repair and refit. Claim.

2. The master of the "Onward," being without funds or credit at Port Louis, and being unable to pay the expense of the said repairs, and the necessary disbursements of the said ship at Port Louis, so as to enable the said ship to resume and prosecute her voyage, and after having communicated with his owners and with the owners and consignees of the cargo, was compelled to resort to a loan of 24,369 dollars on bottomry of the said ship, her cargo and freight, for the purpose of enabling him to pay the said expenses and disbursements, which sum Messrs. H. and Company, of Port Louis, at the request of the master by public advertisement, advanced to the said master at and after the rate of 128 dollars for every 100 dollars advanced, and accordingly the said master, by a bond of bottomry, dated the 13th of October, 1870, by him duly executed in consideration of the sum of 24,369 dollars, Mauritius currency, paid to him by the said Messrs. H. and Company, bound himself and the said ship and her cargo, namely, about 940 tons of teak timber, and her freight, to pay unto Messrs. H. and Company, their assigns, or order or indorsees, the said sum of 24,369 dollars with the aforesaid maritime premium thereon, within twenty days next after the arrival of the "Onward" at her port of discharge, from the said intended voyage, the said payment to be made both in capital and interest in British sterling money, at and after the rate of 4s. for every dollar, with a condition, that in case the said ship and cargo should be lost, during her voyage from Port Louis to Queenstown or Falmouth, for orders, and thence to her port of discharge in the United Kingdom or on the Continent between Bordeaux and Hamburg, both ports inclusive, then, that the said sum of 24,369 dollars, and maritime premium thereon, should not be recoverable.

3. The "Onward" subsequently proceeded on her voyage, and on the

APPENDIX C

Forms.

O. 19, R. 4.

7th of February, 1871, arrived with her cargo on board at the port of Liverpool, which was her port of discharge.

4. The bond was duly indorsed and assigned to the plaintiffs.

5. The ship has been sold by order of the Court, and the proceeds of the sale thereof have been brought into Court, and the freight has also been paid into Court.

6. The said sum of 24,369 dollars, with the maritime premium thereon, still remain due to the plaintiffs. By a decree made on the 10th of May, 1871, the Court pronounced for the validity of the bond, so far as regarded the ship and freight, and condemned the proceeds of the ship and freight in the amount due on the bond. The principal and premium still remain owing to the plaintiffs, and the proceeds of the said ship and her freight available for payment thereof are insufficient for such payment.

The plaintiffs claim :—

1. That the Court pronounce for the validity of the bond so far as regards the cargo :
2. That the Court condemn the defendants and their bail in so much of the amount due to the plaintiffs on the bond, for principal, maritime premium, and for interest from the time when such principal and premium ought to have been paid, as the proceeds of the ship and freight available for payment of the bond shall be insufficient to satisfy, and in costs :
3. Such further relief as the nature of the case requires.

[Title.]

Defence.

The defendants say that the—

Defence.

1. Several averments in the second article of the statement contained are respectively untrue, except the averment that the bottomry bond therein mentioned was given and executed.

3. The "Onward" proceeded on the voyage in the first paragraph of the claim mentioned, under a charter-party made between the defendants and the owners of the vessel, who resided at New York. And the cargo in the said paragraph mentioned belonged to the defendants, and was shipped at Moulmein, by Messieurs T., F., and Company, of Moulmein, consigned to the defendants.

4. When the "Onward" put into Port Louis, the master placed his ship in the hands of Messieurs H. and Company, the persons in the second paragraph of the claim mentioned and the repairs and disbursements in the said second article mentioned were made, directed, and expended under the orders, management, and on the credit of said Messieurs H. and Company, who at the outset contemplated the necessity of securing themselves by the hypothecation of the ship, freight, and cargo.

5. The master of the "Onward" and Messieurs H. and Company did not communicate to the said shippers of the cargo, or to the defendants, who carried on business at Glasgow, as the master knew, the intention of hypothecating the ship, freight, and cargo, or the circumstances which might render such hypothecation advisable or necessary, but on the contrary, without reasonable cause or excuse, abstained from so doing, although the comparatively small value of the ship and freight to be earned, rendered it all the more important that such communication should have been made.

6. A reasonable and proper time was not allowed to elapse between the advertisements for the bottomry loan, and the acceptance of Messieurs H. and Company's offer to make such loan.

[Title.]

Reply.

Reply.

1. The plaintiffs say that the defendants, since the 31st day of December, 1868, have been the only persons forming the firm of T., F., and Co., of Moulmein, mentioned in the third paragraph of the defence.

2. After the master of the "Onward" put into Port Louis as aforesaid, he employed Messieurs H. and Company, in the claim mentioned, as his

agents, and by his directions they by letter communicated to the defendants' firms at Moulmein and Glasgow the circumstances of the ship's distress, and the estimated amount of her repairs.

3. The said Messieurs H. and Company shortly after the said ship was put into their hands at Port Louis, offered the said master, in case he should require them to do so, to make the necessary advances for the ship's repairs, and to take his draft at 90 days' sight on Messrs. B. Brothers, of London, at the rate of 5 per cent. discount for the amount of the advances, together with a bottomry bond on ship, cargo, and freight as collateral security, the bond to be void should the draft be accepted. The said master, and the said Messieurs H. and Company, by letter, communicated to the owners of the "Onward" the circumstances of the said ship's distress, and the aforesaid offer of the said Messrs. H. and Company, and the said master by his letter requested the said owners to give him their directions on the subject. The said owners shortly after receiving such letters, by letter communicated with the defendants at Glasgow, and forwarded to them copies of the said lastly-mentioned letters of the said master, and of the said Messrs. H. and Co.

4. The defendants' houses at Moulmein and Glasgow respectively received the letters referred to in the second paragraph of this reply in time to have communicated with the said master at Port Louis before the giving of the said bottomry bond.

5. The defendants received the said copies of letters referred to in paragraph 4 of this reply, in time for them to have communicated thereon with the said master at Port Louis before the giving of the said bond.

6. The defendants did not at any time answer the said communications of the said Messrs. H. and Company, or in any way communicate or attempt to communicate with the said master, or to direct him not to give, or to prevent him from giving the said bottomry bond on the said cargo.

7. The said bond was duly advertised for sale, and was subsequently, and after a proper interval had elapsed, sold by auction in the usual way. There were several bidders at the sale, and the said Messrs. H. and Company were the lowest bidders in premium, and the said bond was knocked down to them. The said bond was not advertised for until the said ship was ready for sea, and up to that time the master of the said ship had expected to hear from her owners, and had hoped to be put in funds, and had not finally determined to resort to bottomry of the said ship, or her cargo, or freight.

8. Save as herein appears the plaintiffs deny the truth of the several allegations contained in the said answer.

[NOTE.—The facts stated in this reply should, in general, be introduced by amendment into the statement of claim.]

[Title.]

Rejoinder.

The defendants join issue upon the plaintiffs' reply.

9. The facts stated in this reply should in general be introduced by amendment into the statement of claim (a).

(a) *Earp v. Henderson*, 3 Ch. D. 254; 45 L. J. Ch. D. 738; 34 L. T. N. S. 844; but see *Hall v. Eve*, 4 Ch. D. 321; 46 L. J. Ch. D. 145; 35 L. T. N. S. 926; 25 W. R. 177.

APPENDIX C

Forms.

O. 19, R. 4.

APPENDIX C

No. 10.

187 . B. No.

Forms.

[No. X.]

In the High Court of Justice.
Division.CHARTER-
PARTY.

O. 19, R. 4.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* . . . Plaintiffs,
and
E.F. and *G.H.* . . . Defendants.*Statement of Claim.*

Claim.

1. The Plaintiffs were on the 1st of August, 1874, the owners of the steamship "British Queen."

2. On the 1st August, 1874, the ship being then in Calcutta, a charter-party was there entered into between John Smith, the master, on behalf of himself and the owners of the said ship, of the one part, and the defendants of the other part.

3. By the said charter-party it was agreed, amongst other things, that the defendants should be entitled to the whole carrying power of the said steamship for the period of four months certain, commencing from the said 1st August, 1874, upon a voyage or voyages between Calcutta and Mauritius and back; that the defendants should pay for such use of the said steamship to the plaintiffs' agents at Calcutta, monthly, the sum of 1,000*l.*; that the charter should terminate at Calcutta; and that if at the expiration of the said period of four months the said steamship should be upon a voyage, then the defendants should pay pro rata for the hire of the ship up to her arrival at Calcutta, and the complete discharge of her cargo there.4. The "British Queen" made several voyages in pursuance of the said charter-party, and the first three monthly sums of 1,000*l.* each were duly paid.

5. The period of four months expired on the 1st December, 1874, and at that time the steamship was on a voyage from Mauritius to Calcutta. She arrived at Calcutta on the 13th December, and the discharge of her cargo there was completed on the 16th December, 1874.

6. The plaintiffs' agents at Calcutta called upon the defendants to pay to them the fourth monthly sum of 1,000*l.*, and a sum of 500*l.* for the hire of the steamship from the 1st to the 16th December, 1874, but the defendants have not paid any part of the said sums.

The plaintiffs claim—

The sum of 1,500*l.*, and interest upon 1,000*l.*, part thereof, from the 1st December, 1874, until judgment.

The plaintiffs propose that this action should be tried in London.

[Title.]

Statement of Defence.

Defence.

1. By the charter-party sued upon it was expressly provided that if any accident should happen to, or any repairs should become necessary to the engines or boilers of the said steamship, the time occupied in repairs should be deducted from the period of the said charter, and a proportionate reduction in the charter money should be made.

2. On the . . . repairs became necessary to the engines and boilers of the steamship, and ten days were occupied in effecting such repairs.

3. On the . . . an accident happened to the engines of the steamship at Mauritius, and two days were occupied in effecting the repairs necessary in consequence thereof.

4. The defendants are therefore entitled to a reduction in the charter money of 400*l.*

Counter-claim.

By way of set-off and counter-claim the defendants claim as follows:—

5. By the charter-party it was expressly provided that the charterers

should furnish funds for the steamship's necessary disbursements, except in the port of Calcutta, without any commission or interest on any sum so advanced.

6. The defendants paid for the necessary disbursements of the ship in the port of Mauritius between the _____ and the _____ 1874, sums amounting in all to 625*l.* 14*s.* 6*d.* .

7. The charter-party also contained an express warranty that the steamship was at the date thereof capable of steaming nine knots an hour on a consumption of 30 tons of coal a day, and it was further provided by the charter-party that the charterers should provide coal for the use of the said steamship.

8. The steamship was at the date of the charter-party only capable of steaming less than eight knots to an hour, and that only on a consumption of more than 35 tons of coal a day.

9. In consequence of the matters mentioned in the last paragraph, the steamship finally arrived at Calcutta at least 15 days later, and remained under charter at least 15 days longer than she would otherwise have done. She was also during the whole period of the said charter at sea for a much larger number of days than she would otherwise have been, and consumed a much larger quantity of coal on each of such days than she would otherwise have done, whereby the defendants were obliged to provide for the use of the steamship much larger quantities of coal than they would otherwise have been.

The defendants claim—

1. damages in respect of the matters stated in this set-off and counter-claim.

[Title.]

Reply.

1. The plaintiff joins issue upon the second, third, and fourth paragraphs of the defendants' statement of defence. Reply.

2. With respect to the alleged set-off stated in paragraph 6 the plaintiff does not admit the correctness of the amount therein stated. And all sums advanced by them for disbursements were paid or allowed to them by the plaintiffs by deducting the amount thereof from the third monthly sum of 1,000*l.* paid (subject to such deduction) to the plaintiffs' agents at Calcutta by the defendant on or about the 12th November, 1874.

3. With respect to the alleged breach of warranty and the alleged damages therefrom stated in the 7th, 8th, and 9th paragraphs, the plaintiffs say that the steamship was at the date of the charter-party capable of steaming nine knots an hour on a consumption of 30 tons of coal a day. If the steamship did not, during the said charter, steam more than eight knots an hour, and that on a consumption of more than 35 tons a day, as alleged (which the plaintiffs do not admit), it was in consequence of the bad and unfit quality of the coals provided by the defendants for the ship's use.

[Title.]

Joinder of Issue.

The defendants join issue upon the plaintiffs' reply to their set-off and counter-claim. Rejoinder.

No. 11.

187 . B. No.

[No. XI.]

In the High Court of Justice.
Admiralty Division.

COLLISION.
O. 19, R. 4.

Writ issued [].

THE "AMERICAN."

Between *A.B.* and *C.D.* . . . Plaintiffs,
and
E.F. and *G.H.* . . . Defendants.

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APPENDIX C

Forms.

Claim.

O. 19, R. 4.

Statement of Claim.

1. Shortly before 8 A.M. on the 9th of December, 1874, the brigantine "Katie," of 194 tons register, of which the plaintiffs were owners, manned by a crew of eight hands all told, whilst on a voyage from Dublin to St. John's, Newfoundland, in ballast, was in latitude about 46° N., and longitude $40^{\circ} 42'$ W., by account.

2. The wind at such time was about W. by S., a strong breeze, and the weather was clear, and the "Katie" was under double-reefed mainsail, reefed mainstaysail, middle staysail, lower topsail, reefed fore staysail, and jib, sailing full and by on the port tack, heading about N.W. $\frac{1}{2}$ N., and proceeding at the rate of about five knots and a half per hour.

3. At such time a steamship under steam and sail, which proved to be the screw steamship "American," was seen at the distance of three or four miles from the "Katie," broad on her port bow, and steering about E. or E. by S. The master of the "Katie" not having been able to take observations for several days, and her chronometer having run down, and the said master wishing to exchange longitudes with the "American," caused an ensign to be hoisted, and marked his longitude by account on a board which he exhibited over the port side. The "Katie" was kept full and by, and the "American" approached rapidly, and attempted to pass ahead of the "Katie," and caused immediate danger of collision, and although thereupon the helm of the "Katie" was put hard a-port and her mainsheet let go, the "American" with her stem struck the "Katie" on her port side, almost amidships, cutting her nearly in two, and the "Katie" sank almost immediately, her crew being saved by the steamer.

4. The "American" improperly neglected to keep clear of the "Katie."

5. The "American" improperly attempted to pass ahead of the "Katie."

6. The "American" improperly neglected to ease her engines, and improperly neglected to stop and reverse her engines in due time.

The plaintiff claims:—

1. That it may be declared that the plaintiffs are entitled to the damage proceeded for:
2. That the bail given by the defendants be condemned in such damage, and in costs:
3. That the accounts and vouchers relating to such damage be referred to the Registrar, assisted by merchants to report the amount thereof:
4. Such further and other relief as the nature of the case may require.

[Title.]

Statement of Defence.

The defendants say as follows:—

Defence.

1. The "American" is a screw steamship, of 1,368 tons register, with engines of 200-horse power nominal, belonging to the port of Liverpool, and at the time of the occurrences herein-after mentioned was manned by a crew of 40 hands all told, laden with a cargo of general merchandise, and bound from Port-au-Prince in the West Indies to Liverpool.

2. About 8.5 a.m. on the 28th of November, 1874, the "American" was in latitude 46° N., longitude $38^{\circ} 16'$ W., steering E. by S. true magnetic, making under all sail and steam about 12 knots an hour, the wind being about S.W. by S. true magnetic, blowing a strong breeze and the weather hazy, when a vessel, which afterwards proved to be the brigantine "Katie," was observed on the "American's" starboard bow about four miles distant, bearing about S.E. by E. true magnetic, close-hauled to the wind, and steering a course nearly parallel to that of the "American."

3. The "American" kept her course, and when the "Katie" was about three miles distant, her ensign was observed by those on board the "American" run up to the main, and she was seen to have altered her course, and to be bearing down towards the "American." The "American's" ensign was afterwards run up, and her master, supposing that the "Katie" wanted to correct her longitude, or to speak the "American,"

continued on his course, expecting that the "Katie" when she had got sufficiently close to speak or show her black board over her starboard side, would luff to the wind, and pass to windward of the "American."

4. The master of the "American" watched the "Katie," as she continued to approach the "American," and when she had approached as near as he deemed it prudent for her to come, he waved to her to luff, and shortly afterwards, on his observing her to be attempting to cross the bows of the "American," the helm of the latter was immediately put to starboard, and engines stopped and reversed full speed; but notwithstanding, the "American" with her stem came into collision with the port side of the "Katie," a little forward of the main rigging.

5. The "American's" engines were then stopped, and when the crew of the "Katie" had got on board of the "American," the latter's engines were reversed to get her clear of the "Katie," which sunk under the "American's" bows.

6. The "Katie" improperly approached too close to the "American."

7. Those on board the "Katie" improperly neglected to luff, and to pass to windward of the "American."

8. Those on board the "Katie" improperly attempted to cross the bows of the "American."

9. Those on board the "Katie" improperly ported her helm before the said collision.

10. Those on board the "Katie" improperly neglected to star-board her helm before the said collision.

[Title.]

Reply.

The plaintiffs join issue upon the defendants' statement of defence.

Reply.

No. 12.

In the High Court of Justice.
Admiralty Division.

187 . B. No.

[No. XII.]

EQUIPMENT
OF SHIP.
O. 19, R. 4.

Writ issued [].

THE "TWO ELLENS."

Between *A.B.* and *C.D.* Plaintiffs,
and
E.F. Defendant.

Statement of Claim.

1 The said vessel was and is a British Colonial vessel, belonging to the Port of Digby, in Nova Scotia, of which no owner or part owner was at the time of the commencement of this action or is domiciled in England or Wales. Claim.

2. At the time of the commencement of this action the said vessel was under arrest of this Court.

3. About the month of February, 1868, the said vessel was lying in the Port of London, in need of repairs, and of being equipped and supplied with certain other necessaries.

4. By the order of Messrs. K. L., who were duly authorised, the plaintiffs equipped and repaired the said vessel as she needed, and provided the vessel with necessaries, and there is now due to the plaintiffs for such necessary repairing and equipping, and other necessaries, the sum of 305*l.* 3*s.*, together with interest thereon from the 19th day of February, 1868.

The plaintiffs claim:—

1. Judgment for the said sum of 305*l.* 3*s.*, with such interest thereon as aforesaid until judgment:

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2. The condemnation of the ship and the defendant and his bail therein and in the costs of this suit :
3. Such further relief as the nature of the case requires.

[Title].

Statement of Defence.

Defence.

O. 19, R. 4.

1. By an instrument of mortgage, in the form and recorded as prescribed by the Merchant Shipping Act, 1854, bearing date the 9th of March, 1867, and executed by C. M., blacksmith, D. F., master mariner, and W. H., farmer, all of Weymouth, in the county of Digby, in Nova Scotia, the registered owners of 64/64th parts or shares in the vessel, the said C. M., D. F., and W. H. mortgaged 64/64th parts or shares in the vessel, of which the said D. F. was also master, to G. T., of Nova Scotia, in consideration of the sum of 5,000 dollars advanced by him to the said owners, and for the purpose of securing the repayment by them to him of the said sum with interest thereon.

2. By an instrument of transfer, dated the 16th of July, 1868, in the form prescribed by the said Act, and executed by G. T., in consideration of the sum of 5,000 dollars to G. T. paid by the defendant, G. T. transferred to the defendant the mortgage security.

3. The said sum of 5,000 dollars, with interest thereon, still remains due on the said security.

4. The vessel was not under arrest of this Court at the time of the commencement of this action.

5. The vessel did not need to be equipped or repaired as in the fourth paragraph of the plaintiffs' claim mentioned, and she did not at the time of the supply of the articles referred to in the said fourth paragraph as "necessaries" stand in need of such articles. On the contrary, the said vessel could have gone to sea and proceeded on and prosecuted her voyage without such equipments, repairs, and articles referred to as aforesaid, and such equipments, repairs, and other articles were done and effected and supplied for the purpose of reclassing the said vessel, and not for any other purpose ; and the claim of the plaintiffs is not a claim for necessaries within the meaning of the Admiralty Court Act, 1861, sect. 5.

6. The alleged necessaries were not supplied on the credit of the said vessel, but upon the personal credit of J. B., who was the broker for the vessel, and upon the agreement that the plaintiffs were not to have recourse to the vessel.

7. The defendant did not, nor did G. T., in any way order, authorise, or become liable for, and neither of them is in any way liable in respect of the said alleged supplies or any part thereof, and the said vessel was at the time of the commencement of this action and she still is of a less value than the amount which, irrespective of the sums referred to in the next article of this answer, is due to the defendant on the said mortgage security.

8. The defendant, in order to save the vessel from being sold by this Court at the instance of certain of her mariners having liens on the said vessel for their wages, has been compelled to pay the said wages, and he claims, if necessary, to be entitled to stand in the place of such mariners, or to add the amounts so paid by him for wages to the amount secured by the said mortgage, and to have priority in respect thereof over the claim of the plaintiffs.

[Title.]

Reply.

Reply.

1. The plaintiffs admit that 64/64th shares in the said ship the "Two Ellens" were on or about the 9th day of March, 1867, mortgaged by the said C. M., D. F., and W. H., all of Weymouth, in the county of Digby, Nova Scotia, to the said G. T.

2. Save as afore-mentioned, all the several averments in the said Answer contained are respectively untrue.

3. If there was or is any such instrument of transfer as is mentioned in

the second article of the said Answer, the same has never been registered according to the provisions of the Merchant Shipping Act, 1854. APPENDIX C

4. The said G. T. has never been domiciled in or resided in the United Kingdom, and is now resident in Nova Scotia, and the registered owners of the said vessel in the first paragraph of the said Defence mentioned were always and are domiciled in Nova Scotia, and resident out of the United Kingdom. **Forms.**
O. 19, R. 4.

[Title.]

Rejoinder.

The defendant joins issue upon the third and fourth paragraphs of the Reply. Rejoinder.

No. 13.

[No. XIII.]

In the High Court of Justice.
Division.

187 . B. No.

FALSE
IMPRISON-
MENT.

Writ issued 3rd August, 1876.

O. 19, R. 4.

Between A.B. Plaintiff,
and
E.F. Defendant.

Statement of Claim.

1. The plaintiff is a journeyman painter. The defendant is a builder, Claim. having his building yard, and carrying on business at , and for six months before and up to the 22nd August, 187 the plaintiff was in the defendant's employment as a journeyman painter.

2. On the said 22nd August, 187 , the plaintiff came to work as usual in the defendant's yard, at about six o'clock in the morning.

3. A few minutes after the plaintiff had so come to work the defendant's foreman X. Y., who was then in the yard, called the plaintiff to him, and accused the plaintiff of having on the previous day stolen a quantity of paint, the property of the defendant, from the yard. The plaintiff denied the charge, but X. Y. gave the plaintiff into the custody of a constable, whom he had previously sent for, upon a charge of stealing paint.

4. The defendant was present at the time when the plaintiff was given into custody, and authorised and assented to his being so given into custody; and in any case X. Y., in giving him into custody, was acting within the scope and in the course of his employment as the defendant's foreman, and for the purposes of the defendant's business.

5. The plaintiff upon being so given into custody, was taken by the said constable a considerable distance through various streets, on foot, to the police station, and he was there detained in a cell till late in the same afternoon, when he was taken to the police court, and the charge against him was heard before the magistrate then sitting there, and was dismissed.

6. In consequence of being so given into custody, the plaintiff suffered annoyance and disgrace, and loss of time and wages, and loss of credit and reputation, and was thereby unable to obtain any employment or earn any wages for three months.

The plaintiff claims l. damages.

The plaintiff proposes that this action should be tried in Middlesex.

[Title.]

Statement of Defence.

1. The defendant denies that he was present at the time when the plaintiff was given into custody, or that he in any way authorised or Defence.

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O. 19, R. 4.

assented to his being given into custody. And the said X. Y., in giving the plaintiff into custody, did not act within the scope or in the course of his employment as the defendant's foreman, or for the purposes of the defendant's business.

2. At some time about five or six o'clock on the _____, being the evening before the plaintiff was given into custody, a large quantity of paint had been feloniously stolen by some person or persons from a shed upon the defendant's yard and premises.

3. At about half-past five o'clock on the evening of the _____, the plaintiff, who had left off work about half an hour previously, was seen coming out of the shed when no one else was in it, although his work lay in a distant part of the yard from and he had no business in or near the shed. He was then seen to go to the back of a stack of timber in another part of the yard. Shortly afterwards the paint was found to have been stolen, and it was found concealed at the back of the stack of timber behind which the plaintiff had been seen to go.

4. On the following morning, before the plaintiff was given into custody, he was asked by X. Y. what he had been in the shed and behind the stack of timber for, and he denied having been in either place. X. Y. had reasonable and probable cause for suspecting, and did suspect that the plaintiff was the person who had stolen the paint, and thereupon gave him into custody.

[Title.]

Reply.

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

No. 14.

1876. W. No. 672.

[No. XIV.]

FORECLOSURE.

O. 19, R. 4.

In the High Court of Justice.
Chancery Division.

[Name of Judge.]

Writ issued [_____].

Between R. W. Plaintiff,

and

O. S. and J. B. Defendants.

Statement of Claim.

Claim.

1. By an indenture dated the 25th of March, 1867, made between the defendant O. S. of the one part, and the plaintiff of the other part, the defendant O. S., in consideration of the sum of 10,000*l.* paid to him by the plaintiff, conveyed to the plaintiff and his heirs a farm containing 398 acres, situate in the parish of B., in the county of D., with all the coal mines, seams of coal, and other mines and minerals in and under the same, subject to a proviso for redemption of the same premises on payment by the defendant O. S., his heirs, executors, administrators, or assigns, to the plaintiff, his executors, administrators or assigns, of the sum of 10,000*l.*, with interest for the same in the meantime at the rate of 4*l.* per cent. per annum, on the 25th day of September then next.

2. By an indenture dated the 1st day of April, 1867, made between the defendant O. S. of the one part, and the defendant J. B. of the other part, the defendant O. S. conveyed to the defendant J. B. and his heirs the hereditaments comprised in the herein-before stated security of the plaintiff, or some parts thereof, subject to the plaintiff's said security, and subject to a proviso for redemption of the same premises on payment by the defendant O. S., his heirs, executors, administrators, or assigns, to the defendant J. B., his executors, administrators, or assigns, of the sum of 15,000*l.*, with interest for the same in the meantime at the rate of 5*l.* per cent. per annum.

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- O. 19, R. 4.

In the High Court of Justice.
Chancery Division.

Between R. W. Plaintiff,
and
O. S. and J. B. Defendants.
(by original action,)

And between the said O. S. . . . Plaintiff,
and
The said R. W. and J. B., and J. W. . . . Defendants,
(by counter-claim.)

1. This defendant does not admit that the contents of the indenture of the 25th day of March, 1867, in the plaintiff's statement of complaint mentioned, are correctly stated therein. Defence,

2. The indenture of the 1st day of April, 1867, in the statement of claim mentioned, was not a security for the sum of 15,000*l.* and interest at 5*l.* per cent. per annum, but for the sum of 14,000*l.* only, with interest at the rate of 4*l.* 10*s.* per cent. per annum.

3. This defendant submits that under the circumstances in his counter-claim mentioned, the said indentures of the 25th day of March, 1867, and the 1st day of April, 1867, did not create any effectual security upon the mines and minerals in and under the lands in the same indentures comprised, and that the same mines and minerals ought to be treated as excepted out of the said securities.

And by way of counter-claim this defendant states as follows :—

Counter-claim.

1. At the time of the execution of the indenture next hereinafter stated, J. C. A. was seised in fee simple in possession of the lands described in the said indentures, and the mines and minerals in and under the same.
2. By indenture dated the 24th of March, 1860, made between the said J. C. A. of the first part, E. his wife, then E. S., spinster, of the second part, and this defendant and the above-named J. W. of the third part, being a settlement made in contemplation of the marriage, shortly after solemnized, between the said J. C. A. and his said wife, the said J. C. A. granted to this defendant and the said J. W., and their heirs, all the coal mines, beds of coal, and other the mines and minerals under the said lands, with such powers and privileges, as in the now-stating indenture mentioned, for the purpose of winning, working, and getting the same mines and minerals, to hold the same premises to this defendant and the said J. W. and their heirs to the use of the said J. C. A., his heirs and

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assigns, till the solemnization of the said marriage, and after the solemnization thereof to the use of this defendant and the said J. W., their executors and administrators, for the term of 500 years, from the day of the date of the now-stating indenture, upon the trusts therein mentioned, being trusts for the benefit of the said J. C. A., and his wife and the children of their marriage, and from and after the expiration or other determination of the said term of 500 years, and in the meantime subject thereto, to the use of the said J. C. A., his heirs and assigns for ever.

3. By indenture dated the 12th of May, 1860, made between the said J. C. A. of the one part, and W. N. of the other part, the said J. C. A. granted to the said W. N. and his heirs the said lands, except the coal mines, beds of coal, and other mines and minerals thereunder, to hold the same premises unto and to the use of the said W. N., his heirs and assigns for ever, by way of mortgage, for securing the payment to the said W. N. his executors, administrators, or assigns, of the sum of 26,000*l.*, with interest as therein mentioned.
4. On the 14th of January, 1864, the said J. C. A. was adjudicated a bankrupt, and shortly afterwards J. L. was appointed creditor's assignee of his estate.
5. Some time after the said bankruptcy, the said W. N., under a power of sale in his said mortgage deed, contracted with this defendant for the absolute sale to this defendant of the property comprised in his said security for an estate in fee simple in possession, free from incumbrances, for the sum of 26,000*l.*, and the said J. L., as such assignee as aforesaid, agreed to join in the conveyance to this defendant for the purpose of signifying his assent to such sale.
6. By indenture dated the 1st of September, 1866, made between the said W. N. of the first part, the said J. L. of the second part, the said J. C. A. of the third part, and this defendant of the fourth part, reciting the said agreement for sale, and reciting that the said J. L., being satisfied that the sum of 26,000*l.* was a proper price, had, with the sanction of the Court of Bankruptcy, agreed to confirm the said sale, it was witnessed that in consideration of the sum of 26,000*l.* with the privity and approbation of the said J. L., paid by this defendant to the said W. N., he the said W. N. granted, and the said J. C. A. ratified and confirmed to this defendant and his heirs, all the hereditaments comprised in the said security of the 12th day of May, 1860, with their rights, members, and appurtenances, and all the estate, right, title, and interest of them, the said W. N. and J. C. A. therein, to hold the same premises unto and to the use of this defendant, his heirs and assigns for ever.
7. The sale to this defendant was not intended to include anything not included in the security of the 12th of May, 1860, and the said J. L. only concurred therein to signify his approval of the said sale, and did not purport to convey any estate vested in him; and the lastly hereinbefore stated indenture did not vest in this defendant any estate in the said mines and minerals.
8. The plaintiff and the defendant J. R. respectively had, before they advanced to this defendant the moneys lent by them on their securities in the plaintiff's claim mentioned, full notice that the mines and minerals under the said lands did not belong to this defendant. This fact appeared on the abstracts of title delivered to them before the preparation of their said securities. A valuation of the property made by a surveyor was furnished to them respectively on behalf of this defendant before they agreed to advance their money on their said securities; but although the said lands are in a mineral district, the mines and minerals were omitted from such valuation, and they respectively knew at the time of taking their said securities that the same did not include any interest in the mines and minerals.

Forms.

O. 19, R. 4.

9. At the time when the securities of the plaintiff and the defendant J. B. were respectively executed, the plaintiff and the defendant J. B. respectively had notice of the said indenture of settlement of the 24th day of March, 1860.
10. At the time when the plaintiff's security was executed, the mines and minerals under the said lands, with such powers and privileges as aforesaid, were vested in this defendant and the said J. W. for the residue of the said term of 500 years, and subject to the said term, the inheritance in the same mines, minerals, powers, and privileges, was vested in the said J. L. as such assignee as aforesaid.
11. The said security to the plaintiff was by mistake framed so as to purport to include the mines and minerals under the said lands, and by virtue thereof the legal estate in moiety of the said mines and minerals became and now is vested in the plaintiff for the residue of the said term of 500 years.

The defendant O. S. claims as follows:—

1. That it may be declared that neither the plaintiff nor the defendant J. B. has any charge or lien upon that one undivided moiety, which in manner aforesaid became vested in the plaintiff for the residue of the said term of 500 years, of and in the mines and minerals in and under the lands mentioned in the plaintiff's said security.
2. That it may be declared that the said mines and minerals, rights, and privileges, which by the said indenture of settlement were vested in the defendant O. S. and the said J. W. for the said term of 500 years, upon trust as therein mentioned, ought to be so conveyed and assured as that the same may become vested in the defendant O. S. and the said J. W. for all the residue of the said term upon the trusts of the said settlement.
3. That the said R. W. and J. W. may be decreed to execute all such assurances as may be necessary for giving effect to the declaration secondly hereinbefore prayed.
4. To have such further or other relief as the nature of the case may require.

1876. W. 672.

In the High Court of Justice,
Chancery Division.

[*Name of Judge.*]

Between R. W. Plaintiff,
and
O. S. and J. B. Defendants.
(by original action),
And between the said O. S. Plaintiff,
and
The said R. W., and J. B. and J. W. Defendants.
(by counter-claim.)

The Reply of the Plaintiff R. W.

1. The plaintiff joins issue with the defendants upon their several defences, and in reply to the statements alleged by the defendant O. S., by way of counter-claim, the plaintiff says as follows:—
1. The plaintiff does not admit the execution of any such indenture as is stated in the said counter-claim to bear date the 24th of March, 1860.
2. The plaintiff does not admit that the indenture of the 12th of May, 1860, is stated correctly in the statement of claim.
3. When the defendant O. S., in the year 1866, applied to the plaintiff to advance him the sum of 10,000*l.*, he offered to the plaintiff as a

Reply.

APPENDIX C

Forms.

O. 19, R. 4.

security the lands which were afterwards comprised in the indenture of the 25th of March, 1867, including the mines and minerals which he now alleges were not to form part of the security, and the plaintiff agreed to lend the said sum upon the security of the said lands, including such mines and minerals. During the negotiation for the said loan a valuation of the property to be included in the mortgage was delivered to the plaintiff on behalf of the said defendant. Such valuation included the mines and minerals; and the plaintiff consented to make the loan on the faith of such valuation. The plaintiff did not know when he took his security that it did not include any interest in the said mines and minerals; on the contrary, he believed that the entirety of such mines and minerals was to be included therein.

4. The plaintiff does not admit the contents of the indenture of the 1st of September, 1866, to be as alleged, or that it was so framed as not to include the said mines and minerals; or that it was not intended to include anything not included in the security of the 12th of May, 1860, or that J. L. in the counter-claim named only concurred therein to signify his approval of the said sale, and did not purport to convey any estate vested in him.
5. Save so far as the plaintiff's solicitor may have had notice by means of the abstract of title that the mines and minerals under the said lands did not belong to the defendant O. S., the plaintiff had not any notice thereof, and he does not admit that it appeared from the abstract of title that such was the case. The mines were not omitted from any valuation delivered to the plaintiff as mentioned in the counter-claim.
6. The plaintiff admits that when he took his security he was aware that there was indorsed on the deed by which the said lands were conveyed by J. C. A. in the counter-claim named a notice of a settlement of 24th March, 1860, but he had no further or other notice thereof, and though his solicitor inquired after such settlement none was ever produced.
7. The plaintiff submits that if it shall appear that no further interest in the said mines and minerals was conveyed to him by his said security than one undivided moiety of a term of 500 years therein, as alleged by the said counter-claim, such interest is effectually included in the plaintiff's said security, and that he is entitled to foreclose the same.

[No. XV.]

No. 15.

FRAUD.

187 . B. No.

O. 19, R. 4.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between A.B. Plaintiff,
and
E.F. Defendant.

Statement of Claim.

Claim.

1. In or about March, 1875, the defendant caused to be inserted in the *Daily Telegraph* Newspaper an advertisement, in which he offered for sale the lease, fixtures, fittings, goodwill, and stock-in-trade of a baker's shop and business, and described the same as an increasing business, and doing 12 sacks a week. The advertisement directed application for particulars to be made to X. Y.

Forms.

O. 19, R. 4.

2. The plaintiff having seen the advertisement applied to X. Y., who placed him in communication with the defendant, and negotiations ensued between the plaintiff and the defendant for the sale to the plaintiff of the defendant's bakery at with the lease, fixtures, fittings, stock-in-trade, and goodwill.

3. In the course of these negotiations the defendant repeatedly stated to the plaintiff that the business was a steadily increasing business, and that it was a business of more than 12 sacks a week.

4. On the 5th of April, 1875, the plaintiff, believing the said statements of the defendant to be true, agreed to purchase the said premises from the defendant for £500, and paid to him a deposit of £200 in respect of the purchase.

5. On the 15th April the purchase was completed, an assignment of the lease executed, and the balance of the purchase money paid. On the same day the plaintiff entered into possession.

6. The plaintiff soon afterwards discovered that at the time of the negotiations for the said purchase by him and of the said agreement, and of the completion thereof, the said business was and had long been a declining business; and at each of those times, and for a long time before, it had never been a business of more than 8 sacks a week. And the said premises were not of the value of £500, or of any saleable value whatever.

7. The defendant made the false representations herein-before mentioned well knowing them to be false, and fraudulently, with the intention of inducing the plaintiff to make the said purchase on the faith of them.

The plaintiff claims £ damages.

[Title.]

Statement of Defence.

Defence.

1. The defendant says that at the time when he made the representations mentioned in the third paragraph of the statement of claim and throughout the whole of the transactions between the plaintiff and defendant and down to the completion of the purchase and the relinquishment by the defendant of the said shop and business to the plaintiff, the said business was an increasing business, and was a business of over 12 sacks a week. And the defendant denies the allegations of the sixth paragraph of the statement of claim.

2. The defendant repeatedly during the negotiations told the plaintiff that he must not act upon any statement or representation of his, but must ascertain for himself the extent and value of the said business. And the defendant handed to the plaintiff for this purpose the whole of his books, showing fully and truthfully all the details of the said business, and from which the nature, extent, and value thereof could be fully seen, and those books were examined for that purpose by the plaintiff, and by an accountant on his behalf. And the plaintiff made the purchase in reliance upon his own judgment, and the result of his own inquiries and investigations, and not upon any statement or representation whatever of the defendant.

[Title.]

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

Reply.

No. 16.

187 . B. No.

[No. XVI.]

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between A.B. and C.D.

and

E.F. and G.H.

Plaintiffs,

Defendants.

GUARANTEE.

O. 19, R. 4.

APPENDIX C

Forms.

O. 19, R. 4.
Claim.

Statement of Claim.

1. The plaintiffs are brewers, carrying on their business at under the firm of *X.Y. & Co.*
 2. In the month of March, 1872, *M.N.* was desirous of entering into the employment of the plaintiffs as a traveller and collector, and it was agreed between the plaintiffs and the defendants and *M.N.*, that the plaintiffs should employ *M.N.* upon the defendant entering into the guarantee hereinafter mentioned.
 3. An agreement in writing was accordingly made and entered into, on or about the 30th March, 1872, between the plaintiffs and the defendant, whereby in consideration that the plaintiffs would employ *M.N.* as their collector, the defendant agreed that he would be answerable for the due accounting by *M.N.* to the plaintiffs for and the due payment over by him to the plaintiffs of all moneys which he should receive on their behalf as their collector.
 4. The plaintiffs employed *M.N.* as their collector accordingly, and he entered upon the duties of such employment, and continued therein down to the 31st of December, 1873.
 5. At various times between the 29th of September and the 25th of December, 1873, *M.N.* received on behalf of the plaintiffs and as their collector sums of money from debtors of the plaintiffs, amounting in the whole to the sum of £950; and of this amount *M.N.* neglected to account for or pay over to the plaintiffs sums amounting in the whole to £227; and appropriated the last-mentioned sums to his own use.
 6. The defendant has not paid the last-mentioned sums, or any part thereof to the plaintiffs.
- The plaintiffs claim :—

[No. XVII.]

INTEREST SUIT
(PROBATE).
O. 19, R. 4.

No. 17.

187 . B. No.

In the High Court of Justice.
Probate Division.

Between *A.B.* Plaintiff,
and
C.D. Defendant.

Statement of Claim.

Claim.

1. *M.N.*, late of No. High Street, Putney, in the county of Surrey, grocer, deceased, died on or about the day of at No. 1, High Street, Putney, aforesaid, a widower, without child, parent, brother or sister, uncle or aunt, nephew or niece.
2. The plaintiff is the cousin-german, and one of the next of kin of the deceased.

The plaintiff claims :—

That the Court decree to him a grant of letters of administration of the personal estate and effects of the said deceased as his lawful cousin-german, and one of his next of kin.

[Title.]

Defence.

Defence.

1. The defendant admits that *M.N.* died a widower, without child, parent, brother or sister, uncle or aunt, or niece, but he denies that he died without nephew.
2. The deceased had a brother named *G.B.*, who died in his lifetime.
3. *G.B.* was married to *E.H.* in the parish church of in the county of on the day of

APPENDIX C

Forms.

O. 19, R. 4.

Reply.

- Reply.

[No. XVIII.]

LANDLORD
AND TENANT.
O. 19, R. 4.

Between A.B. . . . Plaintiff,
and
C.D. . . . Defendant.

1. On the _____ day of _____ the plaintiff, by deed, Claim.
let to the defendant a house and premises, No. 52, _____ Street,
in the city of London, for a term of 21 years, from the _____ day
of _____, at the yearly rent of 120*l.*, payable quarterly.

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for 21 days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the 24th June, 187 , a quarter's rent became due, and on the 29th of September, 187 , another quarter's rent became due; on the 21st October, 187 , both had been in arrear for 21 days, and both are still due.

5. On the same 21st October, 187 , the house and premises were not and are not now in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

The plaintiff claims :—

1. Possession of the said house and premises.
2. l. for arrears of rent.
3. l. damages for the defendant's breach of his covenant to repair.
4. l. for the occupation of the house and premises from the 29th of September, 187 , to the day of recovering possession.

The plaintiff proposes that this action should be tried in London.

APPENDIX C

No. 19.

187 . B. No.

Forms.

[No. XIX.]

In the High Court of Justice.
Admiralty Division.NECESSARIES
FOR SHIP.

O. 19, R. 4.

Writ issued []

THE "ENTERPRISE."

Between *A.B.* and *C.D.* Plaintiffs,
and
E.F. and *G.H.* Defendants.

Statement of Claim.

Claim.

1. The plaintiffs were at the time herein-after stated and are engineers and ironfounders, carrying on business at Liverpool in the county of Lancaster.

2. In the month of January, 1872, whilst the above-named steam-ship "Enterprise," belonging to the port of London, was in the port of Liverpool, the plaintiffs, having received orders from the master in that behalf, executed certain necessary work to her and supplied her with certain necessary stores and materials, and caused her to be supplied upon their credit with certain necessary work, labour, materials, and necessaries, and thereby supplied the said ship with necessaries within the meaning of the fifth section of the Admiralty Court Act, 1861.

3. There is due to the plaintiffs in respect of such supply of necessaries to the said ship the sum of 577*l.* 2*s.* 6*d.*, and the plaintiffs cannot obtain payment thereof without the assistance of the Court.

The plaintiffs claim :

1. Judgment pronouncing for the claim of the plaintiffs :
2. The condemnation of the defendants and their bail therein, with costs :
3. A reference, if necessary, of the claim of the plaintiffs to the registrar, assisted by assessors, to report the amount thereof :
4. Such further relief as the nature of the case requires.

[Title.]

Defence.

Defence.

1. The defendants deny the allegations contained in the third paragraph of the statement of claim.

2. The defendants admit that the plaintiffs executed certain work to the said ship, and supplied her with certain materials, but they say, that a portion of the work so executed was executed badly and insufficiently, and of the materials so supplied, some were bad and insufficient, and a portion of the work in the claim mentioned was done in and about altering and endeavouring to make good such bad and insufficient work and materials. The defendant has paid in respect of the work and materials in the claim mentioned the sum of 356*l.* 17*s.* 9*d.*, and the said sum is sufficient to satisfy the claims of the plaintiffs.

3. The defendants deny the allegations contained in the second paragraph of the claim, so far as they relate to any claim beyond the said sum of 356*l.* 17*s.* 9*d.*, and say that if the plaintiffs did execute any work or did supply any materials other than the work and materials mentioned in the second paragraph of this defence, such work was not necessary work, and such materials were not necessary materials, within the meaning of the fifth section of Admiralty Court Act, 1861, and were not supplied in such circumstances as to render the defendants liable to pay for the same.

[Title.]

Reply.

Reply.

1. The plaintiffs join issue upon the statement of defence.

No. 20.

187 . B. No.

APPENDIX C

Forms.

[No. XX.]

NEGLIGENCE.

O. 19, R. 4.

In the High Court of Justice.
Division.

Writ issued 3rd August 1876.

Between *A.B.* Plaintiff,
and
E.F. Defendant.

Statement of Claim.

1. The plaintiff is a shoemaker, carrying on business at The Claim.
defendant is a soap and candle manufacturer, of
2. On the 23rd May 1875, the plaintiff was walking eastward along
the south side of Fleet Street, in the city of London, at about three
o'clock in the afternoon. He was obliged to cross Street, which is
a street running into Fleet Street at right angles on the south side. While
he was crossing this street, and just before he could reach the foot pave-
ment on the further side thereof, a two-horse van of the defendant's, under
the charge and control of the defendant's servants, was negligently,
suddenly, and without any warning, turned at a rapid and dangerous
pace out of Fleet Street into Street. The pole of the van struck
the plaintiff and knocked him down, and he was much trampled by
the horses.
3. By the blow and fall and trampling the plaintiff's left arm was
broken, and he was bruised and injured on the side and back, as well as
internally, and in consequence thereof the plaintiff was for four months ill
and in suffering, and unable to attend to his business, and incurred heavy
medical and other expenses, and sustained great loss of business and
profits.

The plaintiff claims l. damages.

[Title.]

Statement of Defence.

1. The defendant denies that the van was the defendant's van, or that it
was under the charge or control of the defendant's servant. The van
belonged to Mr. John Smith, of, a carman and contractor
employed by the defendant to carry and deliver goods for him; and the
persons under whose charge and control the said van was were the servants
of the said Mr. John Smith.
2. The defendant does not admit that the van was turned out of Fleet
Street, either negligently, suddenly, or without warning, or at a rapid or
dangerous pace.
3. The defendant says, that the plaintiff might and could, by the exercise
of reasonable care and diligence, have seen the van approaching him, and
avoided any collision with it.
4. The defendant does not admit the statements of the third paragraph
of the statement of claim.

[Title.]

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

Reply.

APPENDIX C

Forms.

No. 21.

187 . B. No.

[No. XXI.]

In the High Court of Justice.
Admiralty Division.POSSESSION OF
SHIP.

O. 19, R. 4.

Writ issued [].

THE "LADY OF THE LAKE."

Between *A. B.* Plaintiff,
and
E. F. Defendant.

Statement of Claim.

Claim.

1. On or about the 15th of July 1868, an agreement was entered into between the plaintiff and J. D., who was then the sole owner of the above-named barque "Lady of the Lake," whereby J. D. agreed to sell, and the plaintiff agreed to purchase, 32-64th parts or shares of the vessel for the sum of 500*l.*; payment 300*l.* in cash, and the remainder by purchaser's acceptances at three and six months date, and it was thereby agreed that the plaintiff was to be commander of the vessel.

2. The plaintiff accordingly paid to J. D. the sum of 300*l.*, and gave him his (the plaintiff's) acceptances at three and six months' date for the residue of the said purchase money, and J. D. by bill of sale transferred 32-64th parts or shares in the vessel to the plaintiff, which bill of sale was duly registered on the 18th of July 1868; the plaintiff has since been and still is the registered owner of such 32-64th shares.

3. The vessel then sailed under the plaintiff's command on a voyage from Sunderland to the Brazils and other ports, and then on a homeward voyage to Liverpool, where she arrived on the 18th of June 1869, and having there discharged her homeward cargo, she sailed thence under the plaintiff's command with a cargo to the Tyne, and thence to Sunderland, at which port she arrived on the 9th of August 1869.

4. The plaintiff then made several ineffectual applications to J. D., with a view to obtaining another charter for the said vessel, and after she had been lying idle for a considerable time, the plaintiff on or about the 16th of September 1869, obtained an advantageous charter for her to proceed to Barcelona with a cargo of coals, and with a view to enabling her to execute such charter the plaintiff paid the dock dues, and moved the vessel into a slipway in order that her bottom might be cleaned, but on or about the 17th of September, whilst the vessel was on the shore adjoining the slipway, the defendant, to whom the said J. D. had in the meantime transferred his 32-64th parts, forcibly took the vessel out of the possession of the plaintiff, and refused and still refuses to allow the plaintiff to take the vessel on her said voyage to Barcelona, and by reason thereof heavy loss is being occasioned to the plaintiff.

The plaintiff claims:—

1. Judgment giving possession of the vessel "Lady of the Lake" to the plaintiff.
2. The condemnation of the defendant in costs of suit, and in all losses and damages occasioned by the defendant to the plaintiff:
3. Such further relief as the nature of the case requires.

[Title.]

Defence.

Defence.

1. The defendant says that the acceptances in the second paragraph of the claim mentioned were respectively dishonoured by the plaintiff, and have never yet been paid by him.

2. It was agreed between the plaintiff and J. D., that J. D. should act, and he has since always acted, as ship's husband of the "Lady of the Lake."

3. On the 31st of August 1869, J. D. sold to the defendant, for the sum of 400*l.*, and by bill of sale duly executed, transferred to him his 32-64th

shares, and the bill of sale was duly registered on the 14th of September following. APPENDIX C

4. After the "Lady of the Lake" had arrived at Sunderland, and after the defendant had purchased from J. D. his 32-64th shares of the "Lady of the Lake," the defendant placed the vessel in the custody and possession of a shipkeeper. The plaintiff, however, unlawfully removed her from such possession, and thereupon the defendant had the vessel taken into the South Dock of the harbour at Sunderland, with orders that she should be kept there. What the defendant did, as in this article mentioned, he did with the consent and full approval of J. D.

5. At the time of the sale of the "Lady of the Lake" by J. D. to the defendant as afore-mentioned, there was and there still is due from the plaintiff, as part owner of the "Lady of the Lake," to J. D., as part owner and ship's husband, a sum of money exceeding 300*l.* in respect of the vessel and her voyages over and above the amount of the unpaid acceptances.

6. Save as herein appears, the averments in the fourth paragraph of the claim contained are untrue, and if the charter-party mentioned in that paragraph was obtained by the plaintiff as alleged, which the defendant does not admit, it was obtained by him without the authority, consent, or knowledge of J. D. or the defendant.

7. Before the defendant took possession of the vessel afore-mentioned, the plaintiff ceased to be master of her, with the consent of J. D. or the defendant.

8. J. D. has instituted an action against the said vessel in order to have the accounts taken between him and the plaintiff, and to enforce payment of the money due from the plaintiff to him.

[Title.]

Reply.

1. The plaintiff says in reply to the first paragraph of the defence that the bills therein mentioned were dishonoured by the plaintiff because J. D. was indebted to the plaintiff in a large amount for his wages as master, and for his share of the earnings of the "Lady of the Lake," and refused payment thereof. Reply.

2. J. D. did not place the vessel in the exclusive custody or possession of a shipkeeper as in the fifth paragraph of the defence stated or implied. On the contrary, the vessel continued in the custody and possession of the plaintiff, who still holds her register. A man was sent on board the vessel by J. D. to look after J. D.'s share in the said vessel while she was in dock, but he did not dispossess the said plaintiff or take exclusive possession of the vessel, and the plaintiff was not dispossessed of the vessel until on or about the 17th of September last.

3. Except as herein-before appears the plaintiff joins issue upon the defendant's statement of defence.

[Title.]

Rejoinder.

The defendant joins issue upon the first and second paragraphs of the Rejoinder. Reply.

No. 22.

187 . B. No.

[No. XXII.]

In the High Court of Justice,
Division.

[Writ issued 3rd August, 1876.]

Between A.B. . . . Plaintiff,
and
E.F. . . . Defendant.

Statement of Claim.

1. The defendant on the . . . day of . . . made his Claim.

M M 2

PROMISSORY
NOTE.

O. 19, R. 4.

APPENDIX C promissory note, whereby he promised to pay to the plaintiff or his order
 1. three months after date.
 2. The note became due on the _____ day of _____ 1874, and
 the defendant has not paid it.
 The plaintiff claims :—
 The amount of the note and interest thereon to judgment.
 The plaintiff proposes that this action should be tried in the county
 of _____

Forms.

[No. XXII.]

O. 19, R. 4.

[Title.]

Statement of Defence.

Defence.

1. The defendant made the note sued upon under the following circumstances :—The plaintiff and defendant had for some years been in partnership as coal merchants, and it had been agreed between them that they should dissolve partnership, that the plaintiff should retire from the business, that the defendant should take over the whole of the partnership assets and liabilities, and should pay the plaintiff the value of his share in the assets after deducting the liabilities.

2. The plaintiff thereupon undertook to examine the partnership books, and inquire into the state of the partnership assets and liabilities ; and he did accordingly examine the books, and make the said inquiries, and he thereupon represented to the defendant that the assets of the firm exceeded 10,000*l.*, and that the liabilities of the firm were under 3,000*l.*, whereas the fact was that the assets of the firm were less than 5,000*l.*, and the liabilities of the firm largely exceeded the assets.

3. The misrepresentations mentioned in the last paragraph induced the defendant to make the note now sued on, and there never was any other consideration for the making of the note.

[Title.]

Reply.

Reply.

The plaintiff joins issue on the defence.

[No. XXIII.]

No. 23.

PROBATE OF
WILL IN
SOLEMN FORM.

O. 19, R. 4.

In the High Court of Justice.
Probate Division.

187 . B. No.

Writ issued [_____].

Between A.B. Plaintiff,
 and
 E.F. Defendant.

Statement of Claim.

Claim.

1. C. T., late of Bicester in the county of Oxford, gentleman, deceased, who died on the 20th of January, 1875, at Bicester, being of the age of 21 years, made his last will, with one codicil thereto, the said will bearing date the first day of October, 1874, and the said codicil the first of January, 1875, and in the said will appointed the plaintiff sole executor thereof.

2. The said will and codicil were signed by the deceased [or, by X.Y., in the presence and by the directions of the deceased, or signed by the deceased, who acknowledged his signature, or as the case may be] in the presence of two witnesses present at the same time, the said will in the presence of H. P. and J. R., and the said codicil in the presence of J. D. and G. E., and who subscribed the same in the presence of the said deceased.

3. The deceased was at the time of the execution of the said will and codicil respectively of sound mind, memory, and understanding.

The plaintiff claims :—

That the Court shall decree probate of the said will and codicil in solemn form of law.

[Title.]

Statement of Defence.

The defendant says as follows :—

1. The said will and codicil of the said deceased were not duly executed according to the provisions of the statute 1 Vict. c. 26. Defence.

2. The deceased at the time the said will and codicil respectively purport to have been executed was not of sound mind, memory, and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him, whose names are at present unknown to the defendant].

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge being [*state the nature of the fraud*].

5. The said deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof, or of the contents of the residuary clause in the said will [*as the case may be*].

6. The deceased made his true last will, dated the 1st day of January, 1873, and in the said will appointed the defendant sole executor thereof. [*Propound this will as in paragraphs 2 and 3 of claim.*]

The defendant claims :—

1. That the Court will pronounce against the said will and codicil propounded by the plaintiff :

2. That the Court will decree probate of the said will of the said deceased, dated the 1st of January, 1873, in solemn form of law.

[Title.]

Reply.

1. The plaintiff joins issue upon the statement of defence of the defendant, as contained in the first, second, third, fourth, and fifth paragraphs thereof. Reply.

2. The plaintiff says that the said will of the said deceased, dated the 1st of January, 1873, was duly revoked by the will of the said 1st of October, 1873, propounded by the plaintiff in his statement of claim.

No. 24.

187 . B. No.

[No. XXIV.]

In the High Court of Justice.
Common Pleas Division.

Writ issued 3rd August, 1876.

Between A.B. Plaintiff,
and
C.D. Defendant.

RECOVERY OF
LAND.
LANDLORD
AND TENANT.

O. 19, R. 4.

Statement of Claim.

1. On the day of the plaintiff let to the defendant a house, No. 52, street, in the city of London, as tenant from year to year, at the yearly rent of 120*l.*, payable quarterly, the tenancy to commence on the day of

2. The defendant took possession of the house and continued tenant thereof until the day of last, when the tenancy determined by a notice duly given.

Claim.

[Title].

Joinder of Issue.

The defendant *C.D.* joins issue upon the plaintiff *A.B.*'s statement in reply.

No. 25.

187 . B. No.

In the High Court of Justice.
Common Pleas Division.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* Plaintiffs,
and
E.F. Defendant.

Statement of Claim.

APPENDIX C

Forms.

[No. XXIV.]

O. 19, R. 4.

[No. XXV.]

RECOVERY OF
LAND.

O. 19, R. 4.

Claim.

1. *K.L.*, late of Sevenoaks, in the county of Kent, duly executed his last will, dated the 4th day of April, 1870, and thereby devised his lands at or near Sevenoaks, and all other his lands in the county of Kent, unto and to the use of the plaintiffs and their heirs, upon the trusts therein mentioned for the benefit of his daughters Margaret and Martha, and appointed the plaintiffs executors thereof.

2. *K.L.* died on the 3rd day of January, 1875, and his said will was proved by the plaintiffs in the Court of Probate on or about the 4th day of February, 1875.

3. *K.L.* was at the time of his death seised in fee of a house at Sevenoaks, and two farms near there called respectively the home farm containing 276 acres, and the Longton farm containing 700 acres, both in the county of Kent.

4. The defendant, soon after the death of *K.L.*, entered into possession of the house and two farms, and has refused to give them up to the plaintiff (*a*).

The plaintiffs claim :

1. Possession of the house and two farms :

2. *l.* for mesne profits of the premises from the death of *K.L.* till such possession shall be given.

The plaintiff (*a*) proposes (*a*) that this action should be tried in the county of Kent.

[Title.]

Statement of Defence.

Defence.

1. The defendant is the eldest son of *I.L.* deceased, who was the eldest son of *K.L.*, in the statement of claim named.

2. By articles bearing date the 31st day of May, 1827, and made previous to the marriage of *K.L.* with Martha his intended wife, *K.L.*, in consideration of such intended marriage, agreed to settle the house and two farms in the statement of claim mentioned (and of which he was then seised in fee) to the use of himself for his life, with remainder to the use of his intended wife for her life, and after the survivor's decease, to the use of the heirs of the body of the said *K.L.* on his wife begotten, with other remainders over.

3. The marriage soon after took effect, *K.L.*, by deeds of lease and release, bearing date respectively the 4th and 5th of April, 1828, after reciting the articles in alleged performance of them, conveyed the house and two farms to the use of himself for his life, with remainder to the use of his wife for her life, and after the decease of the survivor of them, to the use of the heirs of the body of *K.L.* on the said Martha to be begotten, with other remainders over.

(*a*) The words "plaintiff" and "plaintiffs" are so printed in the official copy.

APPENDIX C

Forms.

[No. XXV.]

O. 19, R. 4.

4. There was issue of the marriage an only son Thomas L and two daughters. After the death of Thomas L , which took place in February, 1864, *K.L.*, on the 3rd May, 1864, executed a disentailing assurance, which was duly enrolled and thereby conveyed the house and two farms to the use of himself in fee.

[Title.]

Reply.

Reply.

The plaintiffs join issue upon the defendant's statement of defence (a).

[No. XXVI.]

SALVAGE.

O. 19, R. 4.

No. 26.

In the High Court of Justice.
Admiralty Division.

Writ issued [].

THE "CAMPANIL."

Between *A.B.* and *C.D.* Plaintiffs,
and
E.F. and *G.H.* Defendants.

Statement of Claim.

Claim.

1. The "Brazilian" is a screw steamer belonging to the port of New castle, of the burthen of 1,359 tons gross registered tonnage, and propelled by engines of 130 horse power, and at the time of the rendering of the salvage services hereinafter mentioned she was navigated by her master

(a) On reading this precedent one cannot fail to be struck with its inaccuracy and obscurity. In the first place the name of the defendant is given at the head of the statement of claim as *E.F.* In the 1st paragraph of the statement of defence we find it stated that he is the eldest son of *I.L.*, the eldest son of *K.L.*, and we have no account of how he happens to bear the name assigned to him in the statement of claim: this however is a small obscurity; we find at the end of the defence that *K.L.*'s eldest and indeed only son was named Thomas and not I. One of these statements must be erroneous. Further there is a want of completeness in any aspect of the defence in that there is no allegation of the death of *K.L.*'s wife, Martha, who, on the allegations in the statement of defence, was tenant for life of the property in remainder on *K.L.*'s decease. But the principal objection which we entertain to the precedent is the extreme obscurity as to what the defence is intended to be. In the 4th paragraph it is alleged that *K.L.*, on the 3rd May, 1864, executed a disentailing assurance, which was duly enrolled, and thereby conveyed, &c., to himself in fee. There is in this clause no appearance of doubt as to the efficacy of this conveyance; there is no statement as to his affecting or purporting to convey, and if he did convey as therein stated, this statement of defence admits the plaintiff's case. But if this be so, we cannot understand why the reply should be a joinder of issue, nor on the whole can we ascertain distinctly what point is intended to be raised by these pleadings. Unless some doubt is intended to be suggested as to the validity of the disentailing assurance, we are inclined to think no defence whatsoever is made in the case, and the joinder of issue in the reply is bad pleading; and if any such inefficacy is intended to be suggested, there ought to have been some intimation thereof in the statement of defence. It has been suggested to us by an ingenious friend, and with much probability, that the ground of defence meant to be put forward is that the instrument of the 31st of May, 1827, being only articles and not a formal conveyance, *K.L.*, was not thereby tenant in tail, but only tenant for life with remainder in strict settlement, and consequently unable by the instrument of February, 1864, to affect the fee in the property; but if this be so, surely it ought to have been clearly put forward.

APPENDIX C

Forms.

[No. XXVI.]

O. 19, R. 4.

and a crew of twenty-four hands. She left the port of Newcastle on the 27th of November, 1873, on a voyage to Genoa, and thence by way of Palmaras and Aguilas to the Tyne, and about 10 a.m. on the 26th of December, 1873, in the course of her homeward voyage, with a cargo of merchandise, she was off the coast of Portugal, the Island of Ons bearing about S.E. by E., when those on board her sighted a disabled steamer about four points on their starboard bow, in-shore, flying signals of distress. A strong gale was blowing at the time, and there was a very heavy sea running.

2. The "Brazilian" at once made towards the disabled steamer, which proved to be the "Campanil," the vessel proceeded against in this action. She was heavily laden with a cargo of iron ore. The "Brazilian" as she approached the "Campanil" signalled to her, and the "Campanil" answered by signal that her engines had broken down. By this time the "Campanil" was heading in-shore, rolling heavily, and shipping a large quantity of water. The "Brazilian" came under the lee of the "Campanil" and asked if she wanted assistance. Her master replied that he wanted to be towed to Vigo as his vessel had lost her screw. The master of the "Brazilian" then asked those on board the "Campanil" to send him a hawser, and for a long time those on board the "Brazilian" made attempts to get a hawser from the "Campanil," and exposed themselves and their vessel to great danger in doing so. The wind and sea rendering it impossible to get the hawser whilst the "Brazilian" was to leeward of the "Campanil," the "Brazilian" went to windward and attempted to float lines by means of life buoys to the "Campanil." During all this time the "Campanil" was quite unmanageable, and yawed about, and there was very great difficulty in manœuvring the "Brazilian" so as to retain command over her and keep her near the "Campanil." It was necessary to keep constantly altering the engines of the "Brazilian," setting them on ahead and reversing them quickly, and in consequence the engines laboured heavily and were exposed to great danger of being strained.

3. Whilst the "Brazilian" was endeavouring to float lines to the "Campanil," the "Campanil" made a sudden lurch and struck the "Brazilian" on her port quarter, knocking in her port bulwark and rail, and causing other damage to the vessel. After many unsuccessful efforts by those on board the "Brazilian," and after they had lost two life buoys and a quantity of rope, a hawser from the "Campanil" was at length made fast on board the "Brazilian," and the "Brazilian" with the "Campanil" in tow steamed easy ahead. A second hawser was then got out and made fast with coir springs, and the "Brazilian" then commenced to tow full speed ahead, each hawser having a full scope of 90 fathoms.

4. The "Brazilian" made towards Vigo, which was about 35 miles distant, the vessels made about two knots an hour, the "Brazilian" keeping her engines going at full speed. "The Brazilian" laboured very heavily, and both vessels shipped large quantities of water.

5. About noon one of the tow ropes broke, and both vessels were in danger of being driven ashore, broken water and rocks appearing to leeward, distant about two miles. After great difficulty the broken hawser was made fast again with a heavy spring of a number of parts of rope, and the "Brazilian" towed ahead under the lee of Ons Island.

6. Shortly afterwards the weather moderated and the sea went down a little, and the "Brazilian" was able to make more way, and about 7 p.m. the same day she towed the "Campanil" into Vigo harbour in safety.

7. The "Brazilian" was compelled to remain in harbour the next day to pay port charges and clear at the Custom House.

8. The coast off which the aforesaid services were rendered is rocky and exceedingly dangerous, and strong currents set along it, and but for the services rendered by the "Brazilian" the "Campanil" must have gone ashore and been wholly lost, together with her cargo, and in all probability her master and crew would have been drowned. No other steamer was in sight, and there was not any prospect of any other efficient assistance.

9. In rendering the said services the "Brazilian" and those on board her were exposed to great danger. Owing to the heavy sea, and the necessity of towing with a long scope of hawser, there was great danger of

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[No. XXVI.]

O. 19, R. 4.

fouling the screw of the "Brazilian," and it required constant vigilance on the part of the master and crew to prevent serious accident. The master and crew of the "Brazilian" underwent much extra fatigue and exertion.

10. The damage sustained by the "Brazilian" in rendering the said services amounts to the sum of 150*l.*, and the value of the extra quantity of coal consumed in consequence of the said services is estimated at 16*l.* and 4*l.* 1*s.* 5*d.* was paid by the owners of the "Brazilian" for harbour dues and other charges at Vigo.

11. The value of the "Campanil," her cargo and freight, at the time of the salvage services were (a) as follows, that is to say: The "Campanil" was of the value of 13,000*l.*, her cargo was of the value of 300*l.*, and the gross amount of freight payable upon delivery of the cargo laden on board her at Barrow-in-Furness was 675*l.*

12. The value of the "Brazilian," her freight and cargo, was about 25,050*l.*

The plaintiffs claim:—

1. Such an amount of salvage as to the Court may seem just:
2. That the defendants and their bail be condemned in costs:
3. Such further or other relief as the nature of the case may require.

[Title.]

Statement of Defence.

Defence.

1. The defendants say that upon the 22d of December, 1873, the iron screw steamship "Campanil," of the burden of 660 tons register gross, propelled by engines of 70 horse power, navigated by David Boughton, her master, and a crew of 16 hands, left Porman, bound to Barrow-in-Furness, laden with a cargo of iron ore.

2. At about 8 a.m. of the 26th of December, whilst the "Campanil" was prosecuting her voyage, the shaft of her propeller broke outside the stern tube, and she lost her propeller. The "Campanil" was then brought to the wind, which was south by east, blowing fresh, and she proceeded under sail for Vigo, and continued to do so till about 9.30 a.m., when two steamships which had been for some time in sight, and coming to the northward, approached the "Campanil." The ensign of the "Campanil" was hoisted, union up, as a signal to one of such steamships, which afterwards came to the "Campanil," and proved to be the "Brazilian," whose owners, master, and crew are the plaintiffs.

3. The "Brazilian" then signalled the "Campanil" and inquired what was the matter, and was signalled in reply that the "Campanil" had lost her propeller, and required to be towed to Vigo, upon which the "Brazilian" signalled for the rope of the "Campanil," in order to take her in tow. After this the "Brazilian" steamed round the "Campanil" and up on to her starboard bow, and in so doing the "Brazilian" came with her port quarter into the starboard bow of the "Campanil" and did her considerable damage.

4. The "Brazilian" then threw a heaving line on board the "Campanil," and one of the "Campanil's" hawsers was attached to the line and hauled on board the "Brazilian," which passed one of her hawsers to the "Campanil" by means of life buoys, and when such hawsers had been secured between the two vessels the "Brazilian" commenced to tow the "Campanil" for Vigo, it being at this time about 10.30 a.m., and Ous Island then bearing about south-east by south, and distant about 15 miles.

5. The "Brazilian" proceeded with the "Campanil" in tow, but owing to the two vessels being laden, and to the small power of the "Brazilian," she was only able to make very slow progress with the "Campanil," and it was not until 6.30 p.m. of the said day that the "Brazilian" arrived at Vigo with the "Campanil," which then came to anchor off the town there.

6. The defendants on the day of tendered to the plaintiffs and have paid into Court the sum of 350*l.* for the services so as aforesaid rendered to the "Campanil" and her said cargo and freight,

(a) So printed in the official copy.

and offered to pay the costs, and submit that the same is ample and sufficient. APPENDIX C

[Title.]

Forms.

Reply.

[No. XXVI.]

1. The plaintiffs admit the first and second articles of the Answer, and they admit that the "Brazilian" came into collision with the "Campanil," and caused slight damage to the "Campanil," but save as aforesaid they join issue upon the statement of defence. O. 19, R. 4.
Reply.

No. 27.

187 . No.

[No. XXVII.]

In the High Court of Justice.
Division.

TRESPASS TO
LAND.

Writ issued 3rd August, 1876.

O. 19, R. 4.

Between *A.B.* Plaintiff,
and
E.F. Defendant.

Statement of Claim.

1. The plaintiff was on the 5th March, 1876, and still is the owner and occupier of a farm called Highfield Farm, in the parish of and county of Claim.

2. A private road, known as Highfield Lane, runs through a portion of the plaintiff's farm. It is bounded upon both sides by fields of the plaintiff's, and is separated therefrom by a hedge and ditch.

3. For a long time prior to the 5th March, 1876, the defendant had wrongfully claimed to use the said road for his horses and carriages on the alleged ground that the same was a public highway, and the plaintiff had frequently warned him that the same was not a public highway, but the plaintiff's private road, and that the defendant must not so use it.

4. On the 5th March, 1876, the defendant came with a cart and horse, and a large number of servants and workmen, and forcibly used the road, and broke down and removed a gate which the plaintiff had caused to be placed across the same.

5. The defendant and his servants and workmen on the same occasion pulled down and damaged the plaintiff's hedge and ditch upon each side of the road, and went upon the plaintiff's field beyond the hedge and ditch, and injured the crops there growing, and dug up and injured the soil of the road; and in any case the acts mentioned in this paragraph were wholly unnecessary for the assertion of the defendant's alleged right to use, or the user of the said road as a highway.

The plaintiff claims:—

1. Damages for the wrongs complained of.
2. An injunction restraining the defendant from any repetition of any of the acts complained of.
3. Such further relief as the nature of the case may require.

[Title.]

Statement of Defence.

1. The defendant says that the road was and is a public highway for horses and carriages; and a few days before the 5th March, 1876, the plaintiff wrongfully erected the gate across the road for the purpose of obstructing and preventing, and it did obstruct and prevent the use of the road as a highway. And the defendant on the said 5th March, 1876, caused the said gate to be removed, in order to enable him lawfully to use the road by his horses and carriages as a highway. Defence.

APPENDIX C

Forms.

[No. XXVII.]

O. 19, R. 4.

Reply.

2. The defendant denies the allegations of the fifth paragraph of the statement of claim, and says that neither he nor any of his workmen or servants did any act, or used any violence other than was necessary to enable the defendant lawfully to use the highway.

[Title.]

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

[No. XXVIII.]

O. 28, R. 2.

No. 28.*Form of Demurrer.*

In the High Court of Justice.
Division.

A.B. v. C.D.

The defendant [plaintiff] demurs to the [plaintiff's statement of complaint *or* defendant's statement of defence, *or* of set-off, *or* of counter-claim], [*or* to so much of the plaintiff's statement of complaint as claims *or* as alleges as a breach of contract the matters mentioned in paragraph 17, *or as the case may be*], and says that the same is bad in law on the ground that [*here state a ground of demurrer*] and on other grounds, sufficient in law to sustain this demurrer.

[No. XXIX.]

O. 28, R. 13.

No. 29.*Memorandum of Entry of Demurrer for Argument.*

In the High Court of Justice.
Division.

1874. B. No.

A.B. v. C.D.

Enter for the argument the demurrer of

to

*X.Y.,*Solicitor for the plaintiff [*or, &c.*]

APPENDIX (D.)

APPENDIX D

Forms.

FORMS OF JUDGMENT.

1. *Default of Appearance and Defence in Case of Liquidated Demand.*

1876. B. No.

O. 41, R. 1.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and *E.F.* Defendants.

30th November, 1876.

The defendants [*or* the defendant *C.D.*] not having appeared to the writ of summons herein [*or not having delivered any statement of defence*], it is this day adjudged that the plaintiff recover against the said defendant *l.*, and costs, to be taxed.

2. *Judgment in Default of Appearance in Action for Recovery of Land.*

[Title, &c.]

O. 41, R. 1.

30th November, 1876.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

3. *Judgment in Default of Appearance and Defence after Assessment of Damages.*

1876. B. No.

O. 41, R. 1.

In the High Court of Justice.
Division.

Between *A.B.* and *C.D.* Plaintiffs,
and
E.F. and *G.H.* Defendants.

30th November, 1876.

The defendants not having appeared to the writ of summons herein [*or not having delivered a statement of defence*], and a writ of inquiry, dated , 1876, having been issued directed to the sheriff of to assess the damages which the plaintiff was entitled to recover, and the said sheriff having by his return dated the , 1876, returned that the said damages have been assessed at *l.*, it is adjudged that the plaintiff recover *l.*, and costs, to be taxed.

APPENDIX D

4. Judgment at Trial by Judge without a Jury.

Forms.

[*Year, letter, and number.*]

O. 41, R. 1.

Division.

day of _____, 18

[If in Chancery Division, name of Judge.]

Between *A.B.* Plaintiff,
and
C.D., E.F., and G.H. Defendants.

This action coming on for trial [the day of and]
this day, before in the presence of counsel for the plaintiff and
the defendants [*or, if some of the defendants do not appear*, for the plain-
tiff and the defendant C.D., no one appearing for the defendants E.F. and
G.H., although they were duly served with notice of trial as by the
affidavit of filed the day of appears,]
upon hearing the probate of the will of , the answers of the
defendants C.D., E.F., and G.H., to interrogatories, the admission in
writing, dated and signed by [Mr. the solicitor
for] the plaintiff A.B. and by [Mr. the solicitor for] the
defendant C.D., the affidavit of filed the day of
 , the affidavit of filed the day of
 , the evidence of taken on their oral examination
at the trial, and an exhibit marked X., being an indenture dated, &c., and
made between [parties], and what was alleged by counsel on both sides :
This Court doth declare, &c.

And this Court doth order and adjudge, &c.

5. Judgment after Trial by a Jury.

O. 41, R, 1.

[Title, &c.]

15th November, 1876.

The action having on the 12th and 13th November, 1876, been tried before the Honourable Mr. Justice _____ and a special jury of the county of _____, and the jury having found [*state findings as in officer's certificate*], and the said Mr. Justice _____ having ordered that judgment be entered for the plaintiff for _____ l. and costs of suit [*or as the case may be*]: Therefore it is adjudged that the plaintiff recover against the defendant _____ l. and _____ l. for his costs of suit [*or that the plaintiff recover nothing against the defendant, and that the defendant recover against the plaintiff _____ l. for his costs of defence, or as the case may be*].

6. Judgment after Trial before Referee.

O. 41, R. 1.

[Title, &c.]

30th November, 1876.

The action having on the 27th November, 1876, been tried before X.Y., Esq., an official [or special] referee; and the said X.Y. having found [state substance of referee's certificate], it is this day adjudged that

7. *Judgment upon Motion for Judgment.*

APPENDIX D

[Title, &c.]

Forms.

30th November, 1876.

O. 41, R. 1.

This day before Mr. X., of counsel for the plaintiff [*or as the case may be*], moved on behalf of the said [*state judgment moved for*], and the said Mr. X. having been heard of counsel for and Mr. Y. of counsel for the Court adjudged

APPENDIX E

Forms.

APPENDIX (E.)

FORMS OF PRÆCIPE.

1. *Fieri facias.*

O. 42, R. 10.

1876. B. No.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Seal a writ of fieri facias directed to the sheriff of to levy
against *C.D.* the sum of *l.* and interest thereon at the
rate of *l.* per centum per annum from the day of
[and *l.* costs] to
Judgment [*or* order] dated day of
[Taxing master's certificate, dated day of]
X. Y., solicitor for [*party on whose*
behalf writ is to issue.]

2. *Elegit.*

O. 42, R. 10.

187 . B. No.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Seal a writ of elegit directed to the sheriff of against
of in the county of for not paying to
A.B. the sum of *l.*, together with interest thereon, from the
day of [and the sum of *l.* for costs,] with interest
thereon at the rate of *4l.* per centum per annum.
Judgment [*or* order dated] day of 18
[Taxing master's certificate, dated day of 18]
X. Y.,
Solicitor for

3. *Venditioni Exponas.*

O. 42, R. 10.

187 . B. No.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Seal a writ of venditioni exponas directed to the sheriff of
to sell the goods and of *C.D.* taken under a writ of fieri facias
in this action tested day of
X. Y.,
Solicitor for

4. *Fieri Facias de Bonis Ecclesiasticis.*

APPENDIX E

Forms.

O. 42, R. 10.

In the High Court of Justice.
Division.

187 . B. No.

Between *A.B.* Plaintiff,
and
C.D. Defendant.Seal of writ of fieri facias de bonis ecclesiasticis directed to the bishop
[or archbishop, *as the case may be*] of to levy against *C.D.* the
sum of *l.*Judgment [or order] dated day of
[Taxing master's certificate, dated day of]
X. Y.,
Solicitor for5. *Sequestrari Facias de Bonis Ecclesiasticis.*

187 . B. No.

O. 42, R. 10.

In the High Court of Justice.
Division.Between *A.B.* Plaintiff,
and
C.D. and others Defendants.Seal of writ of sequestrari facias directed to the Lord Bishop of
against *C.D.* for not paying to *A.B.* the sum of
*l.*6. *Writ of Sequestration.*

187 . B. No.

O. 42, R. 10.

In the High Court of Justice.
Division.Between *A.B.* Plaintiff,
and
C.D. and others Defendants.Seal a writ of sequestration against *C.D.* for not
at the suit of *A.B.* directed to [names of Commissioners].
Order dated day of7. *Writ of Possession.*

187 . B. No.

O. 42, R. 10.

In the High Court of Justice.
Division.Between *A.B.* Plaintiff,
and
C.D. and others Defendants.Seal a writ of possession directed to the sheriff of to deliver
possession to *A.B.* of
Judgment dated day of

N N

APPENDIX E8. *Writ of Delivery.*

187 . B. No.

Forms. In the High Court of Justice.
O. 42, R. 10. Division.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Seal a writ of delivery directed to the sheriff of to make
delivery to *A.B.* of

9. *Writ of Attachment.*

187 . B. No.

O. 42, R. 10.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Seal in pursuance of order dated day of an
attachment directed to the sheriff of against *C.D.* for not delivering
to *A.B.*

APPENDIX (F).

APPENDIX

Forms.

FORMS OF WRITS.

1. *Writ of Fieri Facias.*

187 . B. No. O. 42, R. 12.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Victoria, by the Grace of God of the United Kingdom of Great Britain and
Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

We command you that of the goods and chattels of *C.D.* in your bailiwick you cause to be made the sum of *l.* and also interest thereon at the rate of *l.* per centum per annum from the day of *(a)* which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] wherein *A.B.* is plaintiff and *C.D.* and others are defendants [*or* in a certain matter there depending intituled "In the matter of *E.F.*" *as the case may be*], by a judgment [*or* order *(b)*, *as the case may be*] of our said Court, bearing date the day of adjudged [*or* ordered *(b)*, *as the case may be*] to be paid by the said *C.D.* to *A.B.*, together with certain costs in the said judgment [*or* order, *as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing masters of our said Court at the sum of *l.* as appears by the certificate of the said taxing master, dated the day of And that of the goods and chattels of the said *C.D.* in your bailiwick you further cause to be made the said sum of *l.* [*costs*] together with interest thereon at the rate of *4l.* per centum per annum from the day of, *(c)* and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said *A.B.* in pursuance of the said judgment [*or* order, *as the case may be*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

(a) Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

(b) In the case of *Bolton v. Bolton*, ante, p. 399 ; 3 Ch. D. 276 ; 35 L. T. N. S. 358 ; 24 W. R. 663, the form of this writ was amended in the case where execution was allowed for costs on discontinuance.

Interest on a judgment for costs runs from the date of the Master's certificate of taxation, and not from the time of entering up the judgment ; *Schroeder v. Cleugh*, 46 L. J. C. P. D. 365 ; *sub nom. Shroeder v. Clough*, 35 L. T. N. S. 850.

(c) The date of the certificate of taxation. The writ *must* be so moulded as to follow the substance of the judgment or order.

APPENDIX F

2. *Writ of Elegit.*

187 . B. No.

Forms.In the High Court of Justice.
Division.

O. 42, R. 12.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain
and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

Whereas lately in our High Court of Justice in a certain action [*or certain actions, as the case may be*] there depending, wherein *A.B.* is plaintiff and *C.D.* and others are defendants [*or in a certain matter there depending, intituled "In the matter of E.F.," as the case may be*] by a judgment [*or order, as the case may be*] of our said Court made in the said action [*or matter, as the case may be*], and bearing date the . . . day of . . . it was adjudged [*or ordered, as the case may be*] that *C.D.* should pay unto *A.B.* the sum of . . . *l.*, together with interest thereon after the rate of . . . *l.* per centum per annum from the . . . day of . . . together also with certain costs as in the said judgment [*or order, as the case may be*] mentioned, and which costs have been taxed and allowed by . . . one of the taxing masters of our said Court, at the sum of . . . *l.* as appears by the certificate of the said taxing master, dated the . . . day of . . . And afterwards the said *A.B.* came into our said Court, and according to the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said *C.D.*, or any one in trust for him, was seised or possessed of on the . . . day of . . . in the year of our Lord . . . (a) or at any time afterwards, or over which the said *C.D.* on the said . . . day of . . . or, at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of . . . *l.* and . . . *l.*, together with interest upon the said sum of . . . *l.* at the rate of . . . *l.* per centum per annum from the said . . . day of . . . and on the said sum of . . . *l.* (costs) at the rate of 4*l.* per centum per annum from the . . . day of . . . shall have been levied. Therefore we command you that without delay you cause to be delivered to the said *A.B.* by a reasonable price and extent all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said *C.D.*, or any person or persons in trust for him was or were seised or possessed of on the said . . . day of . . . (b) or at any time afterwards, or over which the said *C.D.* on the said . . . day of . . . (b), or at any time afterwards had any disposing power which he might without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A.B.*, as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said two several sums of . . . *l.* and . . . *l.* together with interest as aforesaid, shall have been levied. And

- (a) The day on which the judgment or order was made.
(b) The day on which the decree or order was made.

in what manner you shall have executed this our writ make appear to us in our Court aforesaid, immediately after the execution thereof, under your seals, and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness ourselves at Westminster, &c.

APPENDIX F

Forms.

O. 42, R. 12.

3. *Writ of Venditioni Exponas.*

1875. B. No. O. 42, R. 12.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

Whereas by our writ we lately commanded you that of the goods and chattels of *C.D.* [*here recite the fieri facias to the end*]. And on the day of you returned to us in the

Division of our High Court of Justice aforesaid, that by virtue of the said writ to you directed you had taken goods and chattels of the said *C.D.* to the value of the money and interests aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore, we being desirous that the said *A.B.* should be satisfied his money and interest aforesaid, command you that you expose to sale and sell, or cause to be sold, the goods and chattels of the said *C.D.*, by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Justice immediately after the execution hereof, to be paid to the said *A.B.* And have there then this writ.

Witness ourself at Westminster, the day of in the year of our reign.

4. *Writ of Fieri Facias de Bonis Ecclesiasticis.*

1875. B. No. O. 42, R. 12.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Right Reverend Father in God [*John*] by Divine permission Lord Bishop of greeting: We command you, that of the ecclesiastical goods of *C.D.*, clerk in your diocese, you cause to be made l. which lately before us in our High Court of Justice in a certain action [*or certain actions, as the case may be*] wherein *A.B.* is plaintiff and *C.D.* is defendant [*or in a certain matter there depending, intituled "In the matter of E.F.," as the case may be*], by a judgment [*or order, as the case may be*] of our said Court bearing

APPENDIX F date the day of , was adjudged [or ordered, as the
 case may be] to be paid by the said C.D. to the said A.B., together with
 Forms. interest on the said sum of at the rate of l. per
 O. 42, R. 12. centum per annum, from the day of and have that
 money, together with such interest as aforesaid, before us in our said Court
 immediately after the execution hereof, to be rendered to the said A.B.,
 for that our sheriff of returned to us in our said Court on
 [or "at a day now passed"] that the said C.D. had not any
 goods or chattels or any lay fee in his bailiwick whereof he could cause to
 be made the said l. and interest aforesaid or any part thereof,
 and that the said C.D. was a beneficed clerk (to wit) rector of rectory [or
 vicar of the vicarage] and parish church of , in the said sheriff's
 county, and within your diocese [as in the return], and in what manner
 you shall have executed this our writ make appear to us in our said Court
 immediately after the execution hereof, and have you there then this writ.
 Witness ourself at Westminster, the day of in
 the year of our Lord .

O. 42, R. 12. 5. *Writ of Fieri Facias to the Archbishop de Bonis Ecclesiasticis during the Vacancy of a Bishop's See.*

Victoria [&c., as in the preceding form] : To the Right Reverend Father in God [John] by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, greeting : We command you that of the ecclesiastical goods of C.D., clerk in the diocese of which is within the province of Canterbury, as ordinary of that church, the episcopal see of now being vacant, you cause to be made [&c., conclude as in the preceding form].

6. *Writ of Sequestrari Facias de Bonis Ecclesiasticis.*

1875. B. No.

O. 42, R. 12. In the High Court of Justice.
 Division.

Between A.B. Plaintiff,
 and
 C.D. Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith : To the Right Reverend Father in God [John] by Divine permission Lord Bishop of greeting : Whereas we lately commanded our sheriff of that he should omit not by reason of any liberty of his county, but that he should enter the same, and cause [to be made, if after the return to a fieri facias, or delivered, if after the return to an elegit, &c., and in either case recite the former writ.] And whereupon our said sheriff of on [or "at a day past"] returned to us in the Division of our said Court of Justice, that the said C.D. was a beneficed clerk ; that is to say, rector of the rectory [or vicar of the vicarage] and parish church of in the county of , and within your diocese, and that he had not any goods or chattels, or any lay fee in his bailiwick [here follow the words of the sheriff's return.] Therefore, we command you that you enter

into the said rectory [*or* vicarage] and parish church of _____, and take and sequester the same in your possession, and that you hold the same in your possession until you shall have levied the said _____ *l.* and interest aforesaid, of the rent, tithes, rent-charges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in your diocese of and belonging to the said rectory [*or* vicarage] and parish church of _____ and to the said *C.D.* as rector [*or* vicar] thereof to be rendered to the said *A.B.*, and what you shall do therein make appear to us in our said Court immediately after the execution hereof, and have you there then this writ. Witness ourself at Westminster, the _____ day of _____ in the year of our Lord _____.

APPENDIX F

Forms.

O. 42, R. 12.

7. *Writ of Possession.*

187 . B. No.

O. 42, R. 12.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Victoria, _____ to the sheriff of _____, greeting : Whereas lately in our High Court of Justice, by a judgment of the Division of the same Court [*A.B.* recovered] *or* [*E.F.* was ordered to deliver to *A.B.*] possession of all that _____ with the appurtenances in your bailiwick : Therefore, we command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause the said *A.B.* to have possession of the said land and premises with the appurtenances. And in what manner you have executed this our writ make appear to the Judges of the _____ Division of our High Court of Justice immediately after the execution hereof, and have you there then this writ. Witness, &c.

8. *Writ of Delivery.*

187 . B. No.

O. 42, R. 12.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and others Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of _____ greeting : We command you, that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue*], to be returned to *A.B.*, which the said *A.B.* lately in our _____ recovered against *C.D.* [*or C.D.* was ordered to deliver to the said *A.B.*] in an action in the _____ division of our said Court. And we further command you, that if the said chattels cannot be found in your bailiwick, you distrain the said *C.D.* by all his lands and chattels in your bailiwick, so that neither the said *C.D.* nor any one for him do lay hands on the same until the said *C.D.* render to the said *A.B.* the said chattels ; and in what manner you shall have executed this our writ make appear to the Judges of the _____ Division of our High Court of Justice, immediately after the execution hereof, and have you there then this writ. Witness, &c.

APPENDIX F
Forms.

O. 42, R. 12.

The Like, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on Defendant's Goods the assessed Value of it.

[*Proceed as in the preceding form until the,* (a) and then thus:*] And we further command you, that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said *C.D.* in your bailiwick you cause to be made *l. [the assessed value of the chattels]*, and in what manner you shall have executed this our writ make appear to the Judges of the Division of our High Court of Justice at Westminster, immediately after the execution hereof, and have you there then this writ. Witness, &c.

9. *Writ of Attachment (b).*

O. 42, R. 12.

187 . B. No.

In the High Court of Justice.

Division.

Between *A.B.* Plaintiff,

and

C.D. and others Defendants.

Victoria, &c.

To the sheriff of

greeting.

We command you to attach *C.D.* so as to have him before us in the Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you. Witness, &c.

10. *Writ of Sequestration.*

O. 42, R. 12.

187 . B. No.

In the High Court of Justice.

Division.

Between *A.B.* Plaintiff,

and

C.D. and others Defendants.

Victoria, &c.

To [*names of not less than four Commissioners*] greeting.

Whereas lately in the Division of our High Court of Justice in a certain action there depending, wherein *A.B.* is plaintiff and *C.D.* and others are defendants [*or, in a certain matter then depending, intituled*

(a) This is an error in Queen's printer's copy ; there is no asterisk in preceding form.

(b) Vice-Chancellor Hall, in a case of *Owen v. Pritchard*, W. N. 1876, p. 147, considered that no difficulty would arise by not putting in a date for the return of the writ by the sheriff, and was of opinion that after a reasonable interval the plaintiff might, if no return had been made, require the sheriff to make a return to the writ.

"In the matter of *E.F.*," *as the case may be*] by a judgment [*or order, as the case may be*] of our said Court made in the said action [*or matter*], and bearing date the day of 187 , it was ordered that the said *C.D.* should [pay into Court to the credit of the said action the sum of *l.*, *or, as the case may be*]. Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said *C.D.*, and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal states whatsoever; and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estates of the said *C.D.*, and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said *C.D.* shall [pay into Court to the credit of the said action the sum of *l.*, *or as the case may be*], clear his contempt, and our said Court make other order to the contrary. Witness, &c.

APPENDIX F

Forms.

O 42, R. 12.

Sched. 2.

SECOND SCHEDULE.

REPEALED
ENACTMENTS.

SESSION AND CHAPTER.	TITLE.	EXTENT OF REPEAL.
6 Geo. 4, c. 84 .	An Act to provide for the augmenting the salaries of the Master of the Rolls and the Vice-Chancellor of England, the Chief Baron of the Court of Exchequer, and the Puisne Judges and Barons of the Courts in Westminster Hall, and to enable His Majesty to grant an annuity to such Vice-Chancellor, and additional annuities to such Master of the Rolls, Chief Baron, and Puisne Judges and Barons on their resignation of their respective offices.	Section seven.
32 & 33 Vict. c. 71 .	The Bankruptcy Act, 1869	Section one hundred and sixteen from "provided that at any time," inclusive, to the end of the section.
32 & 33 Vict. c. 83 .	The Bankruptcy Repeal and Insolvent Court Act, 1869.	Section nineteen from "provided that at any time," inclusive, to end of the section.
36 & 37 Vict. c. 66 .	Supreme Court of Judicature Act, 1873.	So much of sections three and sixteen as relates to the London Court of Bankruptcy, section six, section nine, section ten, so much of section thirteen, as relates to additional judges of the Court of Appeal, section thirty-four from "all matters pending in the London Court of Bankruptcy," to "London Court of Bankruptcy," section thirty-five, section forty-eight, section fifty-three, section sixty-three, section sixty-eight, section sixty-nine, section seventy, section seventy-one, section seventy-two, section seventy-three, section seventy-four, and the whole of the schedule.

ADDITIONAL RULES OF COURT.

Under the Supreme Court of Judicature Act, 1875.

(LONDON GAZETTE, 24th August, 1875.)

RULES OF THE SUPREME COURT (COSTS) (a).

At the Court at *Osborne House, Isle of Wight*, the 12th
day of *August*, 1875.

PRESENT,

The QUEEN'S Most Excellent Majesty in Council.

WHEREAS by an Act passed in the present session of Parliament intituled "An Act to amend and extend the Supreme Court of Judicature Act 1873," it is enacted that Her Majesty may, at any time after the passing and before the commencement of the said Act, by Order in Council made upon the recommendation of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer and the Lords Justices of Appeal in Chancery or any five of them and the other Judges of the several Courts intended to be united and consolidated by the said principal Act as amended by the said Act, or of a majority of such other Judges, make any further or additional Rules of Court for carrying the said principal Act and the said Act into effect, and in particular for all or any of the following matters, so far as they are not provided for by the rules in the first schedule to the said Act; that is to say, (1) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in chambers; and (2) For regulating the pleadings practice and procedure in the High Court of Justice and Court of Appeal; and (3) Generally for regu-

(a) This name has been given to these rules by the first rule of the General Rules of December, 1875, which see, *post*, p. 596.

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lating any matters relating to the practice and procedure of the said Courts respectively or to the duties of the officers thereof or of the Supreme Court or to the costs of proceedings therein :

Now therefore Her Majesty, in pursuance of the said Act and by and with the advice of Her Privy Council, and upon the recommendation of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer and the Lords Justices of Appeal in Chancery and a majority of the other Judges of the several Courts intended to be united and consolidated by the said principal Act as amended by the said Act, is pleased to make and issue the additional Rules of Court following for the purposes aforesaid.

C. L. PEEL.

*Additional Rules of Court under the Supreme Court of
Judicature Act, 1875.*

Ord. 1.

ORDER I.

Depositions for
use on trial to
be printed.

Where any written deposition of a witness has been filed for use on a trial, such deposition shall be printed, unless otherwise ordered.

Ord. 2.

ORDER II.

Rules as to
printing depo-
sitions not to
apply where
they have been
before used in
writing.

The Rules of Court as to printing depositions and affidavits to be used on a trial shall not apply to depositions and affidavits which have previously been used upon any proceeding without having been printed.

Ord. 3.

ORDER III.

Affidavits not
within Order
38, Rule 6,
may be printed
by consent or
order.

Other affidavits than those required to be printed by Order XXXVIII., Rule 6, in the schedule to the Supreme Court of Judicature Act, 1875, may be printed if all the parties interested consent thereto, or the Court or Judge so order.

ORDER IV.

The 3rd Rule of the Order XXXIV., in the first schedule to the Supreme Court of Judicature Act, 1875, shall apply to a special case, pursuant to the Act of 13 & 14 Victoria, c. 35.

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Ord. 4.

Special case to
be within
O. 34, R. 3.

ORDER V.

Ord. 5.

Where, pursuant to Rules of Court, any pleading, special case, petition of right, deposition, or affidavit is to be printed, and where any printed or other office copy thereof is to be taken, the following regulations shall be observed:—

Where plead-
ing, &c., to be
printed and
office copy to
be taken.

1. The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by Rule 2 of Order LVI. in the first schedule to the Supreme Court of Judicature Act, 1875.
2. To enable the party printing to print any deposition the officer with whom it is filed shall on demand deliver to such party a copy written on draft paper on one side only.
3. The party printing shall, on demand in writing, furnish to any other party or his solicitor any number of printed copies, not exceeding ten, upon payment therefor at the rate of 1*d.* per folio for one copy, and $\frac{1}{2}$ *d.* per folio for every other copy (a).
4. The solicitor of the party printing shall give credit for the whole amount payable by any other party for printed copies.
5. The party entitled to be furnished with a print shall not be allowed any charge in respect of a written copy, unless the Court or Judge shall otherwise direct.
6. The party by or on whose behalf any deposition, affidavit, or certificate is filed, shall leave a copy with the officer with whom the same is filed, who shall examine it with the original and mark it as an office copy; such copy shall be a copy printed as above provided where such deposition or affidavit is to be printed.

Regulations.

(a) Copies of affidavits to be marked as office copies should be with the clerks of records and writs twenty-four hours before they are required to be used; see particularly subsections, rr. 5, 6. See also subs. 10. Proper stamps should in each case be affixed to the copy, at 2*d.* per folio, before it is left for examination, 20 S. J. 90.

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Ord. 5.Regulations as
to office copies
of pleadings.

7. The party or solicitor who has taken any printed or written office copy of any deposition or affidavit is to produce the same upon every proceeding to which the same relates.
8. Where any party is entitled to a copy of any deposition, affidavit, proceeding or document filed or prepared by or on behalf of another party, which is not required to be printed, such copy shall be furnished by the party by or on whose behalf the same has been filed or prepared.
9. The party requiring any such copy, or his solicitor, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges, and thereupon such copy is to be made and ready to be delivered at the expiration of twenty-four hours after the receipt of such request and undertaking, or within such other time as the Court or Judge may in any case direct, and is to be furnished accordingly upon demand and payment of the proper charges.
10. In the case of an *ex parte* application for an injunction or writ of *ne exeat regno*, the party making such application is to furnish copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court (a):
11. It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit or set of affidavits, and copied on every office copy and copy furnished to a party.
12. The name and address of the party or solicitor by whom any copy is furnished is to be endorsed thereon in like manner as upon proceedings in Court, and such party or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be.

(a) When an office copy is required for immediate use, the copy intended for an office copy will be examined and marked at once, 20 S. J. 90.

13. The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies.

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Ord. 5.

Regulations as
to office copies
of pleadings.

14. In case any party or solicitor who shall be required to furnish any such written copy as aforesaid shall either refuse or, for twenty-four hours from the time when the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for.

15. Where, by any order of the Court (whether of appeal or otherwise), or a Judge, any pleading, evidence, or other document is ordered to be printed, the Court or Judge may order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit.

ORDER VI.

Ord. 6.

The following regulations as to costs of proceedings in the Supreme Court of Judicature shall regulate such costs from the commencement of the Supreme Court of Judicature Acts, 1873 and 1875 :—

Regulations as
to costs.

1. Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "lower scale" in the schedule hereto—

In all actions for purposes to which any of the forms of indorsement of claims on writs of summons in Sections II., IV., and VII., in Part II. of Appendix A., referred to in the 3rd Rule of Order III., in the Schedule to the Supreme Court of Judicature Act, 1875, or other similar forms, are applicable (except as after provided in actions for injunctions):

In all causes and matters by the 34th section of the

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Ord. 6.

Regulations as
to costs.

Supreme Court of Judicature Act, 1873, assigned to the Queen's Bench Division of the Court :

In all causes and matters by the 34th section of the said Act assigned to the Common Pleas Division of the Court.

In all causes and matters by the 34th section of the said Act assigned to the Exchequer Division of the Court ;

In all causes and matters by the 34th section of the said Act assigned to the Probate, Divorce, and Admiralty Division of the Court ;

And also in causes and matters by the 34th section of the said Act assigned to the Chancery Division of the Court in the following cases (that is to say):—

1. By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law or next-of-kin, in which the personal or real or personal and real estate for or against or in respect of which or for an account or administration of which the demand may be made shall be under the amount or value of 1,000*l*.
2. For the execution of trusts or appointment of new trustees in which the trust estate or fund shall be under the amount or value of 1,000*l*.
3. For dissolution of partnership or the taking of partnership or any other accounts in which the partnership assets or the estate or fund shall be under the amount or value of 1,000*l*.
4. For foreclosure or redemption, or for enforcing any charge or lien in which the mortgage whereon the suit is founded, or the charge or lien sought to be enforced, shall be under the amount or value of 1,000*l*. (a).
5. And for specific performance in which the purchase-

(a) A suit to set aside deeds executed by plaintiff on the ground of fraud was instituted in 1871. By decree in 1875, Hall, V.-C., declared two of the deeds void, and ordered their delivery up for cancellation, and as to the other three, they were ordered to stand as security only for the amount, with interest, which should be found due by the plaintiff to the defendant on taking an account. The amount found due was 494*l*. The question was whether the costs were to be taxed on the higher or lower scale ; Hall, V.-C., had given judgment for the higher scale. The Court of Appeal confirmed his judgment, saying the object of the suit, not the form of the decree, was to be looked at, and a suit to set aside deeds on the ground of fraud was clearly not a suit for foreclosure or redemption : *Tweddle v. Lows*, 21 S. J. 497.

money or consideration shall be under the amount or value of 1,000*l*.

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Ord. 6.

6. In all proceedings under the Trustees Relief Acts, or under the Trustees Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates shall be under the amount or value of 1,000*l*.

7. In all proceedings relating to the guardianship or maintenance of infants, in which the property of the infant shall be under the amount or value of 1,000*l*.

8. In all proceedings by original special case, and in all proceedings relating to funds carried to separate accounts, and in all proceedings under any railway or private Act of Parliament, or under any other statutory or summary jurisdiction, and generally in all other cases where the estate or fund to be dealt with shall be under the amount or value of 1,000*l*. (a).

2. Solicitor shall be entitled to charge and be allowed the fees set forth in the column headed "higher scale" in the schedule hereto; in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property and infringement of rights, easements, patents and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed "lower scale" are hereby made applicable (b).

Where solicitors are allowed to charge on higher scale in schedule.

3. Notwithstanding these rules, the Court or Judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs (b).

Discretionary power of Court or Judge.

4. The provisions of Order LXIII., in the first schedule to the Supreme Court of Judicature Act, 1875, shall apply to these rules.

Provisions of Order 63 to apply to these rules.

(a) See the remarks of Vice-Chancellor Malins in *Re Foster*, W. N. 1877, 175.

(b) In an action on a bill of exchange properly brought in the Chancery Division, costs may be allowed on the higher scale: *Pooley v. Driver*, 5 Ch. D. 458.

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The SCHEDULE above referred to.

An Order or Rule herein referred to by number shall mean the Order or Rule so numbered in the First Schedule to the Supreme Court of Judicature Act, 1875.

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
WRITS, SUMMONSES, AND WARRANTS.						
Writ of summons for the commencement of any action	0	6	8	0	13	4
And for endorsement of claim, if special	0	5	0	0	5	0
Concurrent writ of summons	0	6	8	0	6	8
Renewal of a writ of summons	0	6	8	0	6	8
Notice of a writ for service in lieu of writ out of jurisdiction	0	4	0	0	5	0
Writ of inquiry	1	1	0	1	1	0
Writ of mandamus or injunction	0	10	0	1	1	0
Or per folio	0	1	4	0	1	4
Writ of subpœna ad testificandum duces tecum	0	6	8	0	6	8
And if more than four folios, for each folio beyond four	0	1	4	0	1	4
Writ or writs of subpœna ad testificandum for any number of persons not exceeding three, and the same for every additional number not exceeding three	0	6	8	0	6	8
Writ of distringas, pursuant to statute 5 Vict. c. 8	0	13	4	0	13	4
Writ of execution, or other writ to enforce any judgment or order	0	7	0	0	10	0
And if for more than four folios, for each folio beyond four	0	1	4	0	1	4
Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal	0	6	8	0	6	8
Notice thereof to serve on sheriff	0	4	0	0	5	0
Any writ not included in the above	0	7	0	0	10	0
These fees include all endorsements and copies, or præcipes, for the officer sealing them, and attendances to issue or seal, but not the Court fees.						
Summons to attend at Judges' Chambers (a)	0	3	0	0	6	8
Or if special, at taxing officer's discretion, not exceeding	0	6	8	1	1	0
Copy for the judge, when required	0	2	0	0	2	0
Or per folio	—			0	0	4
Original summons for proceedings in Chambers in the Chancery division	0	13	4	1	1	0
And attending to get same and duplicate sealed, and at the proper office to file duplicate and get copies for service stamped	0	13	4	0	13	4
Copy for the judge	0	2	0	0	2	0
Or per folio	—			0	0	4
Endorsing same and copies under 8th rule of the 35th of the Consolidated General Orders of the Court of Chancery	0	6	8	0	6	8

SERVICES, NOTICES, AND DEMANDS.

Service of any writ, summons, warrant, interrogatories, petition, order, notice, or demand on a party who has not entered an appearance, and if not authorised to be served by post	0	5	0	0	5	0
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(a) This item does not include the item below marked with the † on p. 563 ;
W. N. 1876, 22 ; 20 S. J. 242.

	Lower Scale.			Higher Scale.			ADDITIONAL RULES OF COURT. 12 AUG. 1875.
	£	s.	d.	£	s.	d.	
If served at a distance of more than two miles from the nearest place of business, or office of the solicitor serving the same, for each mile beyond such two miles therefrom	0	1	0	0	1	0	
Where in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition	0	7	0	0	7	0	Ord. 6.
Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.							
For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.							
Service where an appearance has been entered on the solicitor or party	0	2	6	0	2	6	
Or if authorised to be served by post	0	1	6	0	1	6	
Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.							
In addition to the above fees, the following allowances are to be made :—							
As to writs, if exceeding two folios, for copy for service, per folio beyond such two	0	0	4	0	0	4	
†As to summons to attend at the Judges' Chambers, for each copy to serve	0	1	0	0	2	0	
Or per folio	0	0	4	0	0	4	
As to notice in proceedings to wind up companies, for preparing or filling up each notice to creditors to attend and receive debts, and to contributories to settle list of contributories	0	1	0	0	1	0	
And for preparing or filling up each notice to contributories to be served with a general order for a call, or an order for payment of a call	0	1	0	0	1	0	
And for drawing notice to be served on contributories or creditors of a meeting, per folio	0	1	0	0	1	0	
For each copy of the last-mentioned notice to serve, per folio	0	0	4	0	0	4	
For preparing or filling up for service in any other cause or matter, each notice to creditors to prove claims, and each notice that cheques may be received, specifying the amount to be received for principal and interest, and costs, if any	0	1	0	0	1	0	
For preparing notice to produce or admit, and one copy	0	5	0	0	7	6	
If special or necessarily long, such allowance as the taxing officer shall think proper, not exceeding per folio	0	0	8	0	1	4	
And for each copy beyond the first, such allowance as the taxing master shall think proper, not exceeding per folio	0	0	4	0	0	4	
For preparing notice of motion	0	2	0	0	5	0	
Or per folio	0	1	0	0	1	0	
Copy for service	0	1	0	0	1	0	
Or per folio	—			0	0	4	
For preparing any necessary or proper notice, not otherwise provided for and demand	0	1	6	0	1	6	
Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three	0	1	0	0	1	0	
And for each copy for service, per folio beyond such three	0	0	4	0	0	4	
Copies for service of interrogatories and petitions, and of orders with necessary notices (if any) to accompany, per folio	0	0	4	0	0	4	
Except as otherwise provided, the allowances for services include copies for service.							
Where notice of filing affidavits is required, only one notice							

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is to be allowed for a set of affidavits filed, or which ought to be filed together.

In proceedings to wind up a company, the usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing, and amount to more than £3.

Where any appointment is or ought to be adjourned, service of a notice of the adjournment, or next appointment, is not to be allowed.

Lower Scale. Higher Scale.
£ s. d. £ s. d.

APPEARANCES.

Entering any appearance	0	6	8	0	6	8
If entered at one time, for more than one person, for every defendant beyond the first	0	1	0	0	2	0
If a person appearing to a writ of summons to recover land limits his defence by his memorandum of appearance, in addition to the above	0	6	8	0	6	8

INSTRUCTIONS.

To sue or defend	0	6	8	0	13	4
For statement of complaint	0	13	4	2	2	0
For statement or further statement of defence	0	6	8	0	13	4
For counter-claim	0	6	8	0	13	4
For reply by plaintiff when defendant sets up a counter-claim	0	13	4	1	1	0
For reply or further reply in any other case by plaintiff or other person, with or without joinder of issue	0	6	8	0	13	4
For confession of defence.	0	6	8	0	13	4
For joinder of issue without other matter and for demurrer	0	6	8	0	13	4
For special case, special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness	0	6	8	0	13	4
To amend any pleading	0	6	8	0	13	4
For affidavit in answer to interrogatories, and other special affidavits	0	6	8	0	6	8
To appeal	0	13	4	1	1	0
To add parties by order of Court or Judge	0	6	8	0	13	4
For counsel to advise on evidence when the evidence in chief is to be taken orally	0	6	8	0	6	8
Or not to exceed	0	13	4	1	1	0
For counsel to make any application to a Court or Judge where no other brief	0	6	8	0	10	0
For brief on motion for special injunction	0	13	4	1	1	0
For brief on hearing or trial of action upon notice of trial given, whether such trial be before a Judge, with or without a jury, or before an official or special referee, or on trial of an issue of fact before a Judge, commissioner, or referee, or on assessment of damages	1	1	0	2	2	0
For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence.						
Fees for instructions for brief are not to apply to a hearing on further consideration.						

DRAWING PLEADINGS AND OTHER DOCUMENTS.

Statement of claim	0	10	0	1	1	0
Or per folio	0	1	0	0	1	0

	Lower Scale			Higher Scale.			ADDITIONAL RULES OF COURT: 12 AUG. 1875.
	£	s.	d.	£	s.	d.	
Statement of defence	0	5	0	0	10	0	Ord. 6.
Or per folio	0	1	0	0	1	0	
Statement of defence and counter claim	0	5	0	1	1	0	
Or per folio	0	1	0	0	1	0	
Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, demurrer, and any other pleading (not being a petition or summons) and amendments of any pleading	0	5	0	0	10	0	
Or per folio	0	1	0	0	1	0	
Particulars, breaches, and objections, when required, and one copy to deliver	0	5	0	0	6	8	
Or such amount as the taxing officer shall think fit, not exceeding per folio	0	0	8	0	1	4	
If more than one copy to be delivered, for each other copy per folio	0	0	4	0	0	4	
Special case, whether original or in action, affidavits in answer to interrogatories and other special affidavits, special petitions, and interrogatories, per folio	0	1	0	0	1	0	
Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, demurrer, special case and petition before a Court or Judge, sheriff, commissioner, referee, examiner, or officer of the Court, when necessary and proper in addition to pleadings, including necessary and proper observations, per folio	0	1	0	0	1	0	
Brief on application to add parties	0	6	8	0	10	0	
Or per folio	0	1	0	0	1	0	
Brief on further consideration, per sheet of 10 folios	0	6	8	0	6	8	
Accounts, statements, and other documents for the Judges' Chambers, when required, and fair copy to leave, per folio	0	0	8	0	1	4	
Advertisements to be signed by Judge's clerk, including attendance therefor	0	6	8	0	13	4	
Bill of costs for taxation, including copy for the taxing officer	0	0	8	0	0	8	

COPIES.

Of pleadings, briefs, and other documents where no other provision is made, at per folio	0	0	4	0	0	4
Where, pursuant to Rules of Court, any pleading, special case or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the court), at per folio	0	0	4	0	0	4
And for examining the proof print, at per folio	0	0	2	0	0	2
And for printing the amount actually and properly paid to the printer, not exceeding per folio (a)	0	1	0	0	1	0
And in addition for every 20 beyond the first 20 copies, at per folio (a)	0	0	1	0	0	1
And where any part shall properly be printed in a foreign language, or as a fac-simile, or in any unusual or special manner, or where any alteration in the docu-						

(a) These items are altered by the Rules of the Supreme Court, June, 1876, as follows:—

20. The schedule to "The Rules of the Supreme Court (Costs)" is hereby altered in the following particulars:—

The allowance for printing a document not exceeding ten folios shall be 10s., and, in addition, for every twenty beyond the first twenty copies of any document not exceeding twenty-four folios, 2s.

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Lower Scale. Higher Scale.
£ s. d. £ s. d.

ment being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable.

These allowances are to include all attendances on the printer.

The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor.

In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes (videlicet) :—

And of any pleading for delivery to the opposite party, or filing in default of appearance

Of any special case for filing

Of any petition of right for presentation, if presented in print, and for the solicitor of the Treasury, and service on any party

Of any pleading, special case, or petition of right, for the use of the Court or Judge

Of any affidavit to be sworn to in print

And of any pleading, special case, petition of right, or evidence for the use of counsel in Court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor, at per folio

0 0 2 0 0 3

Such additional allowances for printed copies for the Court or Judge, and for counsel, are not to be made where written copies have been made previously to printing, and are not in any case to be made more than once in the progress of the cause.

Close copies, whether printed or written, are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing officer.

Inserting amendments in a printed copy of any pleading, special case, or petition of right, when not reprinted

0 1 0 0 5 0
0 0 4 0 0 4

Or per folio

PERUSALS.

Of statement of complaint, statement of defence, reply, joinder of issue, demurrer, and other pleading (not being a petition or summons) by the solicitor of the party to whom the same are delivered

0 6 8 0 13 4
0 0 4

Or per folio

Of amendment of any such pleading in writing

0 6 8 0 6 8
0 0 4

Or per folio

If same reprinted

0 6 8 0 13 4
0 0 4

Or per folio of amendment

Of interrogatories to be answered by a party by his solicitor

0 6 8 0 13 4
0 0 4

Or per folio

Of special case by the solicitor of any party except the one by whom it is prepared

0 6 8 0 13 4
0 0 4

Or per folio

Of copy order to add parties, notice of defendant's claim against any person not a party to the action under O. XVI., r. 18, and of defendant's statement of defence and counter claim served on a person not a

	Lower Scale.			Higher Scale.			ADDITIONAL RULES OF COURT. 12 AUG. 1875. Ord. 6.
	£	s.	d.	£	s.	d.	
party under O. XXII., r. 6 , by the solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of complaint is also to be allowed unless the solicitor has been previously allowed such perusal	0	6	8	0	13	4	
Or per folio	—			0	0	4	
Of notice to produce and notice to admit by the solicitor of the party served	0	6	8	0	13	4	
Of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of other special affidavits by the solicitor of the party against whom the same can be read, per folio	0	0	4	0	0	4	

ATTENDANCES.

To obtain consent of next friend to sue in his name	0	6	8	0	13	4
To deliver or file any pleading (not being a petition or summons) and a special case	0	3	4	0	6	8
To inspect, or produce for inspection, documents pursuant to a notice to admit	0	6	8	0	13	4
Or per hour	0	6	8	0	6	8
To examine and sign admissions	0	6	8	0	13	4
To inspect, or produce for inspection, documents referred to in any pleading or affidavit, pursuant to notice under O. XXXI., r. 14	0	6	8	0	6	8
Or per hour	0	6	8	0	6	8
To obtain or give any necessary or proper consent	0	6	8	0	6	8
To obtain an appointment to examine witnesses	0	6	8	0	6	8
On examination of witnesses before any examiner, commissioner, officer, or other person	0	13	4	0	13	4
Or according to circumstances, not to exceed	2	2	0	2	2	0
Or if without counsel, not to exceed	—			3	3	0
On deponents being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit	0	6	8	0	6	8
On a summons at Judges' Chambers	0	6	8	0	6	8
Or according to circumstances not to exceed	1	1	0	1	1	0
In the Chancery Division, all allowances for attending at the Judges' Chambers are to be by the Judge or chief clerk as heretofore.						
To file chief clerks' and taxing masters' certificates, and get copy marked as an office copy	0	6	8	0	6	8
On counsel with brief or other papers—						
If counsel's fee one guinea	0	3	4	0	6	8
If more and under five guineas	0	6	8	0	6	8
If five guineas and under 20 guineas	0	6	8	0	13	4
If 20 guineas	0	13	4	1	1	0
If 40 guineas or more	—			2	2	0
On consultation or conference with counsel	0	13	4	0	13	4
To enter or set down action, demurrer, special case, or appeal, for hearing or trial	0	6	8	0	6	8
In court on motion of course and on counsel and for order	0	10	0	0	13	4
To present petition for order of course and for order	0	6	8	0	13	4
In Court on every special motion, each day	0	6	8	0	13	4
On same when heard each day	0	13	4	0	13	4
Or according to circumstances	1	1	0	2	2	0
On demurrer, special case, or special petition, or application adjourned from the Judges' Chambers, when in the special paper for the day, or likely to be heard	0	6	8	0	10	0
On same when heard	0	13	4	1	1	0
Or according to circumstances, not to exceed	1	1	0	2	2	0
On hearing or trial of any cause, or matter, or issue of						

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fact, in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a Judge with or without a jury, or commissioner, or referee, or on assessment of damages, when in the paper

When heard or tried

Or according to circumstances

When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent . . .

And expenses (besides actual reasonable travelling expenses) each day, including Sundays

Or if the solicitor has to attend on more than one trial or assessment at the same time and place, in each case .

The expenses in such case to be rateably divided.

To hear judgment when same adjourned

Or according to circumstances

To deliver papers (when required) for the use of a judge prior to a hearing

If more than one judge

On taxation of a bill of costs

Or according to circumstances, not to exceed

In causes for purposes within the cognizance of the Court of Chancery before the Act passed, such further fee as the taxing officer may think fit, not exceeding the allowances heretofore made.

To obtain or give an undertaking to appear

To present a special petition, and for same answered .

On printer to insert advertisement in Gazette . . .

On printer to insert same in other papers, each printer .

Or every two

On registrar to certify that a cause set down is settled, or for any reason not to come into the paper for hearing

For an order drawn up by chief clerk, and to get same entered

On counsel to procure certificate that cause proper to be heard as a short cause, and on registrar to mark same

To mark conveyancing counsel or taxing master . .

For preparing and drawing up an order made at Chambers in proceedings to wind up a company and attending for same, and to get same entered

And for engrossing every such order, per folio . . .

Lower Scale. Higher Scale.
£ s. d. £ s. d.

0	10	0	0	10	0
0	13	4	1	1	0
2	2	0	2	2	0
2	2	0	3	3	0
1	1	0	1	1	0
1	1	0	1	11	6
0	6	8	0	13	4
0	13	4	1	1	0
0	6	8	0	6	8
0	13	4	0	13	4
0	6	8	0	6	8
2	2	0	2	2	0
0	6	8	0	6	8
0	6	8	0	6	8
0	6	8	0	6	8
0	6	8	—	—	—
0	6	8	—	—	—
0	6	8	0	6	8
0	6	8	0	6	8
0	6	8	0	6	8
0	13	4	0	13	4
0	0	4	0	0	4

NOTE.—An order of course means an order made on an *ex parte* application, and to which a party is entitled as of right on his own statement and at his own risk.

OATHS AND EXHIBITS.

Commissioners to take oaths or affidavits. For every oath, declaration, affirmation, or attestation upon honour, in London or the country

The solicitor for preparing each exhibit in town or country

The commissioner for marking each exhibit

0	1	6	0	1	6
0	1	0	0	1	0
0	1	0	0	1	0

TERM FEES.

For every term commencing on the day the sittings in London and Middlesex of the High Court of Justice commence, and terminating on the day preceding the next such sittings, in which a proceeding in the cause or matter by or affecting the party, other than the issuing and serving the writ of summons, shall take place

0	15	0	0	15	0
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	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
And further, in country agency causes or matters, for letters	0	6	0	0	6	0
Where no proceeding in the cause or matter is taken which carries a term fee, a charge for letters may be allowed, if the circumstances require it.						
In addition to the above an allowance is to be made for the necessary expense of postages, carriage and transmission of documents (a).						

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Special Allowances and General Provisions.

*Special
Allowances
and General
Provisions.*

1. As to writs of summons requiring special indorsement, original special cases, pleadings and affidavits in answer to interrogatories, and other special affidavits, when the higher scale is applicable, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper.

2. As to drawing any pleading or other document, the fees allowed shall include any copy made for the use of the solicitor, agent, or client, or for counsel to settle.

3. As to instructions to sue or defend, when the higher scale is applicable, if in consequence of the instructions being taken separately from more than three persons (not being co-partners) the taxing officer shall consider the fee above provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable.

4. As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit.

5. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponents to settle and read over.

(a) See rule April 3rd, 1876, Admiralty Division, *post*, p. 607.

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Ord. 6.*Special
Allowances
and General
Provisions.*

6. As to delivery of pleadings, services and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service.

7. As to perusals the fees are not to apply where the same solicitor is for both parties.

8. As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed (a).

Agency and
correspondence
in country
agency causes,
what allow-
ances for.

9. As to agency correspondence, in country agency causes and matters, if it be shown to the satisfaction of the taxing officer that such correspondence has been special and extensive, he is to be at liberty to make such special allowance in respect thereof as in his discretion he may think proper.

Attendance at
Chambers, pre-
paration of case
for Chambers.

10. As to attendances at the Judges' Chambers, where, from the length of the attendance, or from the difficulty of the case, the Judge or Master shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the Judge or Master in Chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the Judge or master may allow such fee in lieu of the fee of 1*l.* 1*s.* above provided, not exceeding 2*l.* 2*s.* or where the higher scale is applicable 3*l.* 3*s.*, or in proceedings to wind up a company 5*l.* 5*s.*, as in his discretion he may think fit; and where the preparation of the case or matter to lay it before a Judge at Chambers on a summons shall have required and received from the solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the Judge to deserve higher remuneration than the ordinary fees, the Judge may allow to the solicitor,

(a) It was held that this rule applies to all divisions of the High Court, and that it should be construed to include the qualifying expenses of a witness, who should be a proper person for the purpose, and who has been engaged for the purpose of giving evidence: *Mackley v. Chillingworth*, 2 C. P. D. 273; 46 L. J. C. P. D. 484; 36 L. T. N. S. 514; 25 W. R. 650.

by a memorandum in writing expressly made for that purpose and signed by the Judge, specifying distinctly the grounds of such allowance, such fee, not exceeding 10 guineas, as in his discretion he may think fit, instead of the above fees of 2*l.* 2*s.*, 3*l.* 3*s.*, and 5*l.* 5*s.*

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11. As to attendances at the Judges' Chambers, where by reason of the non-attendance of any party (and it is not considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the Judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested.

Attendance at
Chambers
where attend-
ance is ad-
journed with-
out any useful
progress made.

12. A folio is to comprise 72 words, every figure comprised in a column being counted as one word.

13. Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by counsel, are to be allowed; but as to affidavits, a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time.

What costs to
be allowed.

14. As to counsel attending at Judges' Chambers, no costs thereof shall in any case be allowed, unless the Judge certifies it to be a proper case for counsel to attend (*a*).

As to fee for
counsel attend-
ing at Cham-
bers.

(*a*) Except in applications for time, it is not necessary in the Chambers of the Master of the Rolls for attendance of counsel to be expressly allowed: *Webb v. Fitzgerald*, W. N. 1875, 244.

ADDITIONAL
RULES OF
COURT.

12 AUG. 1875.

Ord. 6.*Special
Allowances
and General
Provisions.*

15. As to the inspection of documents under Order XXXI., Rule 14, no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection.

16. As to taking copies of documents in possession of another party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4*d.* per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof.

17. Where a petition in any cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be 2*l.* 2*s.* The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court. In any other case in which a solicitor of a party served necessarily or properly peruses any such petition without appearing thereon, he is to be allowed a fee not exceeding 2*l.* 2*s.*

18. The Court or Judge may, at the hearing of any cause or matter, or upon any application or procedure in any cause or matter in Court or at Chambers, and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed, or may direct the

taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length; and in any case where such question shall not have been raised before and dealt with by the Court or Judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so.

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RULES OF
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19. In any case in which, under the preceding Rule No. 18, or any other rule of Court, or by the order or direction of a Court or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

20. Where in the Chancery Division any question as to any costs is under the preceding Rule 18 dealt with at Chambers, the chief clerk is to make a note thereof, and state the same on his allowance of the fees for attendances at Chambers, or otherwise as may be convenient for the information of the taxing officer.

21. Where any party appears upon any application or proceeding in Court or at Chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such application unless the Court or Judge shall expressly direct such costs to be allowed.

22. As to applications to extend the time for taking any

ADDITIONAL
RULES OF
COURT.

12 AUG. 1875.

Ord. 6.*Special
Allowances
and General
Provisions.*
—

proceeding limited by Rules of Court (subject to any special order as to the costs of and occasioned by any such application), the costs of one application are, without special order, to be allowed as costs in the cause or matter, but (unless specially ordered) no costs are to be allowed of any further application to the party making the same as against any other party, or any estate or fund in which any other party is interested.

Powers and
authorities of
taxing officers.

23. The taxing officers of the Supreme Court, or of any Division thereof, shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been performed by any of the masters, taxing masters, registrars, or other officers of any of the courts whose jurisdiction is by the Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities as previous to the commencement of the Act were vested in any of such officers, including examining witnesses, directing production of books, papers, and documents, making separate certificates or allocaturs, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a Judge.

24. The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance such officer shall in his discretion consider unnecessary in consequence of the interest of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested.

25. When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such

party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect.

ADDITIONAL
RULES OF
COURT.
12 AUG. 1875.

Ord. 6.

*Special
Allowances
and General
Provisions.*

—
Powers and
authorities of
taxing officers.

26. As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.

27. As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed.

28. The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act, and the Rules of Court in pursuance thereof, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal.

Practice as to
costs of Courts
whose jurisdic-
tion is trans-
ferred so far as
not inconsistent
to remain in
force.

29. As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the causes or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

Discretionary
fees and allow-
ances to be in
discretion of
taxing officer.

ADDITIONAL
RULES OF
COURT.

12 AUG. 1875.

Ord. 6.

*Special
Allowances
and General
Provisions.*

—
Powers and
authorities of
taxing officers.

30. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof, objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same (a).

31. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto (a).

32. Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as to the Judge may seem just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid (a).

33. Such application shall be heard and determined by the Judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the Judge shall otherwise direct.

34. When a writ of summons for the commencement of an action shall be issued from a district, and when an action

(a) The provisions of rr. 30, 31, 32, apply even in cases where the whole of the proceedings took place before the Acts came into operation: *Anon.*, W. N. 1875, 219; 20 S. J. 80.

proceeds in a district registry, all fees and allowances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued in London, and if the action proceeded in London, shall apply to such writ of summons issued from and other proceedings in the district registry.

ADDITIONAL
RULES OF
COURT.

12 AUG. 1875.

Ord. 6.

*Special
Allowances
and General
Provisions.*

CAIRNS, C.
A. E. COCKBURN.
G. JESSEL.
COLERIDGE.
FITZROY KELLY.
W. M. JAMES.
GEORGE MELLISH.
RICHD. MALINS.
JAMES BACON.
CHARLES HALL.
G. BRAMWELL.
COLIN BLACKBURN.

JOHN MELLOR.
ROBT. LUSH.
WM. BALIOL BRETT.
A. CLEASBY.
W. R. GROVE.
J. R. QUAIN.
JAMES HANNEN.
C. E. POLLOCK.
W. V. FIELD.
J. W. HUDDLESTON.
NATHANIEL LINDLEY.

ORDER IN
COUNCIL.
12 AUG. 1875.

**District
Regis-
trars.**

At the Court at *Osborne House, Isle of Wight*, the 12th day
of *August*, 1875.

PRESENT,

The QUEEN'S Most Excellent Majesty in Council.

WHEREAS by "The Supreme Court of Judicature Act, 1873," it is enacted that it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars in such places as shall be in such Order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are hereinafter mentioned; and Her Majesty may thereby appoint that any Registrar of any County Court, or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from which an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such District Registrar, shall and may be a District Registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned:

And whereas by "The Supreme Court of Judicature Act, 1875," it is provided that where any such Order has been made, two persons may, if required, be appointed to perform the duties of District Registrar in any district named in the Order, and such persons shall be deemed to be joint District Registrars, and shall perform the said duties in such manner as may from time to time be directed by the said Order, or any Order in Council amending the same:

And whereas it has seemed fit to Her Majesty, by and with the advice of Her Privy Council, that there should be District Registrars in certain places in England: Now, therefore, Her Majesty, by and with the advice aforesaid, is pleased to order, and it is hereby ordered, as follows:—

That there shall be District Registrars in the places of

Liverpool, Manchester (a), and Preston, and the District Registrar at Liverpool of the High Court of Admiralty, and the District Prothonotary at Liverpool of the Court of Common Pleas at Lancaster, shall be and are hereby appointed the District Registrars in Liverpool; and the District Prothonotary at Manchester (a) of the said Court of Common Pleas shall be and is hereby appointed the District Registrar in Manchester; and the District Prothonotary at Preston of the said Court of Common Pleas shall be and is hereby appointed the District Registrar at Preston; and that the district for each such place shall be the district now assigned to each such District Prothonotary, under the provisions and authority of "The Common Pleas at Lancaster Amendment Act, 1869."

ORDER IN
COUNCIL.
12 AUG. 1875.

**District
Regis-
trars.**

That there shall be a District Registrar in Durham, and that the District Prothonotary of the Court of Pleas at Durham shall be and is hereby appointed the District Registrar in Durham; and that the district shall be the district, for the time being, of the County Court holden at Durham.

That, in the places mentioned in the Schedule annexed, there shall be District Registrars, and that the Registrar of the County Court held in any such place shall be and is hereby appointed the District Registrar in such place, and that the district for each such place shall be the district, for the time being, of the County Court holden at such place.

C. L. PEEL.

(a) The district prothonotary at Manchester having died, and the office being unnecessary, it was abolished, and Mr. Henry John Walker, Registrar of the County Court of Hampshire, holden at Southampton, appointed district registrar for Manchester. Order in Council, 9th December, 1876.

ORDER IN
COUNCIL.
12 AUG. 1875.

**District
Regis-
trars.**

Bangor.
Barnsley.
Barnstaple.
Bedford.
Birkenhead.
Birmingham.
Boston.
Bradford.
Bridgewater.
Brighton.
Bristol.
Bury St. Edmunds.
Cambridge.
Cardiff.
Carlisle.
Carmarthen.
Cheltenham.
Chester.
Colchester.
Derby.
Dewsbury.
Dover.
Dorchester.
Dudley.
East Stonehouse.
Exeter.
Gloucester.
Great Grimsby,
Great Yarmouth.
Halifax.
Hanley.
Hartlepool.
Hereford.
Huddersfield.
Ipswich.

SCHEDULE.

Kingston-on-Hull.
Kings Lynn.
Leeds.
Leicester.
Lincoln.
Lowestoft.
Maidstone.
Newcastle-upon-Tyne.
Newport, Monmouth.
Newport, Isle of Wight.
Newtown.
Northampton.
Norwich.
Nottingham.
Oxford.
Pembroke Docks.
Peterborough.
Poole.
Portsmouth.
Ramsgate.
Rochester.
Sheffield.
Shrewsbury.
Southampton.
Stockton-on-Tees.
Sunderland.
Swansea.
Truro.
Totnes.
Wakefield.
Walsall.
Whitehaven.
Wolverhampton.
Worcester.
York.

APPENDIX.

APPENDIX

APPENDIX.

ORDER AS TO COURT FEES

UNDER THE

SUPREME COURT OF JUDICATURE ACT, 1875.

October 28th, 1875.

The Right Honourable HUGH MACCALMONT BARON CAIRNS, Lord High Chancellor of Great Britain, by and with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, doth hereby in pursuance and execution of the powers given by the Supreme Court of Judicature Act, 1875, and all other powers and authorities enabling him in this behalf, order and direct in manner following :—

ORDER AS TO
COURT FEES.

28 Oct.,
1875.

I.

The fees and percentages contained in the Schedule hereto are fixed and appointed to be, and shall be taken in the High Court of Justice, and in the Court of Appeal, and in any Court to be created by any commission and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, and by any officer paid wholly or partly out of public moneys who is attached to any of those Courts or the Supreme Court, or any Judge of those Courts, or any of

ORDER AS TO
COURT FEES.

**28 Oct.,
1875.**

them ; and the said fees and percentages shall be taken by stamps, except those taken in the District Registries, which shall, until further order, be taken in money, and applied and accounted for in such manner as the Treasury may from time to time direct.

II.

The fees and percentages set forth in the column headed Lower Scale in the Schedule hereto, are to be taken and paid in all cases in which the Lower Scale of fees is to be charged and allowed to solicitors under the provisions of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, issued by Order in Council, dated the 12th day of August, 1875, and the fees and percentages set forth in the column headed Higher Scale in the Schedule hereto are to be taken and paid in all other cases.

III.

In causes and matters by the 34th section of the Supreme Court of Judicature Act, 1873, assigned to the Chancery Division :—

The solicitor or party acting in person shall, on any proceeding in which he claims to pay fees according to the Lower Scale, file with the proper officer a certificate in the form hereunder set forth, of which certificate the officer is, at the request of any solicitor or any party acting in person in the cause or matter, to mark a copy without a fee.

On production of such copy of the certificate, all officers of the Court are to receive and file all proceedings in the cause or matter bearing stamps according to the Lower Scale.

In any case certified for the Lower Scale of Court fees, in which it shall happen that the solicitor shall become entitled to charge and be allowed according to the Higher Scale of solicitors' fees, the deficiency in the fees of Court is to be made good.

In any case in which the fees have been paid upon the Higher Scale, and in which it shall happen that the solicitor

shall become entitled to charge and be allowed only according to the Lower Scale of solicitors' fees, the excess of fees so paid may be allowed upon the taxation of costs, if the circumstances of the case shall, in the judgment of the taxing officer, justify such allowance.

ORDER AS TO
COURT FEES.

28 Oct.,
1875.

IV.

The provisions in this Order shall not apply to or affect any of the matters following (that is to say) :—

The existing fees and percentages in respect of any of the jurisdictions which are not, by the Supreme Court of Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or the Court of Appeal ;

The existing fees and percentages in respect of any matter at the time of the passing of the Supreme Court of Judicature Act, 1875, within the jurisdiction of the Court of Probate, the Court for Divorce and Matrimonial Causes, or the Admiralty Court, or relating to any appeal from the Chief Judge in Bankruptcy, except so far as the procedure in any such matter, or the fees or percentages to be taken in respect thereof, is or are expressly varied by the Schedule to the said Act, or by this Order, or by any Rules of Court made or to be made by Order in Council before the commencement of the said Act.

The existing fees and percentages in respect of any criminal proceedings, other than such proceedings on the Crown side of the Queen's Bench Division as the scale contained in the Schedule hereto may be applicable to ;

The existing fees and percentages in respect of matters on the Revenue side of the Exchequer Division, and proceedings and business in the office of the Queen's Remembrancer other than such

ORDER AS TO
COURT FEES.

**28 Oct.,
1875.**

matters, proceedings, and business as the scale contained in the Schedule hereto may be applicable to;

The existing fees and percentages authorised to be taken by any sheriffs, under sheriffs, deputy sheriffs, bailiffs, or other officers or ministers of sheriffs;

The existing fees and percentages directed to be taken or paid by any Act of Parliament, and in respect of which no fee or percentage is hereby provided;

The existing fees and percentages which shall have become due or payable before the commencement of the Judicature Acts, 1873 and 1875;

The existing fees and percentages in respect of any proceedings in any cause or matter pending at the commencement of the said Acts, and in respect of which no fee or percentage is hereby provided.

V.

The existing rules and practice, applicable to proceedings by persons suing *in formâ pauperis*, shall continue and be applicable to proceedings to which this Order relates.

VI.

Save as otherwise provided by this Order, all existing fees and percentages which may be taken in any of the Courts whose jurisdiction is, by the Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or Court of Appeal, or in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, or by any officer paid wholly or partly out of public moneys who is attached to any of those Courts, or the Supreme Court, or any judge

of those Courts, or any of them, shall be and are hereby abolished.

ORDER AS TO
COURT FEES.

28 Oct.,
1875.

VII.

A folio is to comprise 72 words, every figure comprised in a column being counted as one word.

VIII.

The provisions of Order LXIII. in the first Schedule to the Supreme Court of Judicature Act, 1875, shall apply to this Order.

IX.

This Order shall come into operation at the time of the commencement of the Supreme Court of Judicature Acts, 1873 and 1875.

*Form of Certificate for paying Lower Scale of Court
Fees above referred to.*

(Title of cause or matter.)

I hereby certify that to the best of my judgment and belief the Lower Scale of Fees of Court is applicable to this case.

Dated, &c.

A. B.,
Solicitor for Plaintiff or Defendant.

ORDER AS TO
COURT FEES.28 Oct.,
1875.*The SCHEDULE above referred to.*

An Order or Rule herein referred to by number, shall mean the Order or Rule so numbered in the First Schedule to the Supreme Court of Judicature Act, 1875.

SUMMONSES, WRITS, COMMISSIONS, AND WARRANTS.

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
On sealing a writ of summons for commencement of an action	0	5	0	0	10	0
On sealing a concurrent, renewed or amended writ of summons for commencement of an action	0	2	6	0	2	6
On sealing a notice for service under Order XVI., Rule 18	0	2	6	0	2	6
On sealing a writ of mandamus or injunction	0	10	0	1	0	0
On sealing a writ of subpoena not exceeding three persons	0	2	6	0	5	0
On sealing every other writ	0	5	0	0	10	0
On sealing a summons to originate proceedings in the Chancery Division	0	5	0	0	10	0
On sealing a duplicate thereof	0	1	0	0	5	0
On sealing a copy of same for service	0	1	0	0	5	0
On sealing or issuing any other summons or warrant	0	2	0	0	3	0
On sealing or issuing a commission to take oaths or affidavits in the Supreme Court	5	0	0	5	0	0
Every other commission	1	0	0	1	0	0
On marking a copy of a petition of right for service	0	1	0	0	5	0

APPEARANCES.

On entering an appearance, for each person	0	2	0	0	2	0
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COPIES.

For a copy of a written deposition of a witness to enable a party to print the same, for each folio	0	0	4	0	0	4
For examining a written or printed copy, and marking same as an office copy, for each folio	0	0	2	0	0	2
For making a copy and marking same as an office copy, for each folio	0	0	6	0	0	6
For a copy in a foreign language, the actual cost.						
For a copy of a plan, map, section, drawing, photograph, or diagram, the actual cost.						
For a printed copy of an order, not being an office or certified copy, for each folio	0	0	1	0	0	1

ATTENDANCES.

On an application, with or without a subpoena, for any officer to attend as a witness, or to produce any record or document to be given in evidence (in						
---	--	--	--	--	--	--

	Lower Scale.			Higher Scale.			ORDER AS TO COURT FEES.
	£	s.	d.	£	s.	d.	
addition to the reasonable expenses of the officer) for each day or part of a day he shall necessarily be absent from his office	1	0	0	1	0	0	28 Oct., 1875.
The officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further expenses which may probably become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application.							
The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited.							

OATHS, &c.

For taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, for each person making the same	0	1	6	0	1	6
And in addition thereto for each exhibit therein referred to and required to be marked, whether annexed or not	0	1	0	0	1	0

FILING.

On filing a special case or petition of right	0	10	0	1	0	0
On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, warrant of attorney, cognovit, bail, satisfaction piece, and writ of execution with return	0	2	0	0	2	0
On filing a scheme pursuant to the Statute 30 & 31 Vict. c. 127, or the Liquidation Act, 1868	1	0	0	1	0	0
On filing a caveat	0	5	0	0	5	0

CERTIFICATES.

For a certificate of appearance, or of a pleading, affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof	0	1	0	0	4	0
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SEARCHES AND INSPECTIONS.

On an application to search for an appearance or an affidavit, and inspecting the same	0	1	0	0	1	0
On an application to search an index, and inspect a pleading, decree, order or other record, unless otherwise expressly provided for by any Act of Parliament or this order, and to inspect documents deposited for safe custody or production pursuant to an order, for each hour or part of an hour occupied	0	2	6	0	2	6
Not exceeding on one day	0	10	0	0	10	0

EXAMINATION OF WITNESSES.

For every witness sworn and examined by an examiner, or other officer in his office, including oath, for each hour	0	10	0	0	10	0
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ORDER AS TO
COURT FEES.28 Oct.,
1875.Lower Scale. Higher Scale.
£ s. d. £ s. d.

For an examination of witnesses by any such officer away from the office (in addition to reasonable travelling and other expenses), per day	3	0	0	3	0	0
The officer may require a deposit of stamps on account of fees and a deposit of money on account of expenses, which may probably become payable beyond any amount paid for fees and expenses upon the examination, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof and deliver the same to the party making the deposit.						
The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amount so paid and deposited.						
These fees are not to apply to the examination of witnesses for the purpose of any enquiry, taxation of costs, or other proceeding before the officer.						

HEARING.

For entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause for trial or hearing in any Court in London or Middlesex, or at any assizes, including a demurrer, special case, and petition of right, but not any other petition, nor a summons adjourned from Chambers	1	0	0	2	0	0
For a certificate of an associate of the result of trial	1	0	0	1	0	0

JUDGMENTS, DECREES, AND ORDERS.

For drawing up and entering a judgment, or a decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at Chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal	0	10	0	1	0	0
For drawing up and entering any other order, whether made in Court or at Chambers	0	3	0	0	5	0
For copy of a plan, map, section, drawing, photograph, or diagram, required to accompany any order, the actual cost.						

TAKING ACCOUNTS.

On taking an account of a receiver, guardian, consignee, bailee, manager, provisional, official, or voluntary liquidator, or sequestrator, or of an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, co-partner, execution creditor, or other person liable to account, when the amount found to have been received without deducting any payment shall not exceed £200	0	2	0	0	2	0
Where such amount shall exceed £200 for every £50 or fraction of £50	0	0	6	0	0	6

Lower Scale. Higher Scale.
£ s. d. £ s. d.

ORDER AS TO
COURT FEES.

28 Oct.,
1875.

In the case of any such receiver, guardian, consignee, bailee, manager, liquidator, sequestrator, or execution creditor, the fees shall, upon payment, be allowed in the account unless the Court or Judge shall otherwise direct, and in the case of taking the accounts of such other accounting parties, the fees shall be paid by the party having the conduct of the order under which such account is taken, as part of his costs of the cause or matter (unless the Court or Judge shall otherwise direct), and in such case shall be taken upon the certificate of the result of any such account; but the fees shall be due and payable, although no certificate is required, on the account taken, or on such part thereof as may be taken, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the account.

The officer taking the account may require a deposit of stamps on account of fees before taking the account, not exceeding the fees on the full amount appearing by the account to have been received, and the officer or his clerk taking such deposit shall make a memorandum thereof on the account.

TAXATION OF COSTS.

For taxing a bill of costs where the amount allowed does not exceed £8

0 2 0 0 4 0

Where the amount exceeds £8, for every £2 allowed, or a fraction thereof

0 0 6 0 1 0

These fees, except where otherwise provided, shall be taken on signing the certificate or on the allowance of the bill of costs, as taxed, but the fees shall be due and payable if no certificate or allocatur is required on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.

The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk on taking such deposit shall make a memorandum thereof on the bill of costs.

For a certificate or allocatur of the result, not being a judgment

0 0 0 1 0 0

The 58th Rule of Order V. of the Chancery Funds Consolidated Rules, 1874, shall continue in force and be acted upon in cases to which it is applicable.

PETITIONS.

For answering a petition for hearing in Court, and setting down

0 5 0 1 0 0

ORDER AS TO
COURT FEES.28 Oct.,
1875.

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
For answering a non-attendable petition, not being a petition for an order of course	0	5	0	0	10	0
On a matter of course order, on a petition of right	0	10	0	0	10	0
On an order for a commission on a petition of right	1	0	0	1	0	0

REGISTER OF JUDGMENTS AND LIS PENDENS.

For registering a judgment or lis pendens although more than one name may have to be registered	0	2	6	0	2	6
For re-registering same	0	1	0	0	1	0
For a search for each name	0	1	0	0	1	0
For a certificate of entry of satisfaction	0	1	0	0	1	0
For certificate of a judgment for registration in Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit	0	2	0	0	2	0
On filing for registration a certificate issued out of Courts of Dublin or Court of Session in Scotland under the same Act, although more than one name may have to be registered under the same Act	0	7	0	0	7	0
On every certificate of the entry of a satisfaction under the same Act	0	1	0	0	1	0
For a search made in one or both of the Registers of Irish and Scotch Judgments, for each name	0	1	0	0	1	0

MISCELLANEOUS.

On a report of a Private Bill in Parliament	5	0	0	5	0	0
On an allowance of bye-laws or table of fees	1	0	0	1	0	0
On a fiat of a Judge	0	5	0	0	5	0
On signing an advertisement	0	0	0	1	0	0
Upon a reference to a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions, or a District Registrar, for the purpose of any investigation or inquiry other than the taking of an account for which another fee is herein provided, for every hour or part of an hour the Master or Registrar is occupied	0	10	0	0	10	0
A deposit on account of fees before proceeding with such reference, or at any time during the course thereof, may be required, and a memorandum thereof shall be delivered to the party making the deposit.						
On taking acknowledgment of a deed by a married woman	1	0	0	1	0	0
On taking a recognizance or bond	0	10	0	0	10	0
On taking bail, and taking same off the file and delivering	0	2	0	0	2	0
On a commitment	0	5	0	0	5	0
On an application to produce Judge's notes	0	5	0	0	5	0
On appointment of commissioners under glebe exchange	1	0	0	1	0	0
On examining and signing inrolments of decrees and orders	3	0	0	3	0	0
On admission or re-admission of a solicitor	5	0	0	5	0	0
On a written request for information at the Chancery Pay Office	0	2	6	0	2	6
For preparing a power of attorney at the Chancery Pay Office	0	3	0	0	3	0

	Lower Scale.			Higher Scale.			ORDER AS TO COURT FEES.
	£	s.	d.	£	s.	d.	
For transcript of an account in the books at the Chancery Pay Office, for each opening	0	2	0	0	2	0	28 Oct., 1875.

CAIRNS, C.

G. JESSEL.

COLERIDGE.

FITZROY KELLY.

W. M. JAMES.

GEORGE MELLISH.

G. BRAMWELL.

NATHANL. LINDLEY.

We certify that this Order is made with the concurrence
of the Commissioners of Her Majesty's Treasury.

MAHON.

ROW. WINN.

ORDER
AS TO THE
TAKING OF THE FEES AND PERCENTAGES
IN THE
SUPREME COURT OF JUDICATURE,
BY STAMPS,
EXCEPT IN THE DISTRICT REGISTRIES.

October 28, 1875.

ORDER AS TO
COURT FEES.

28 Oct.,
1875.

WHEREAS, by Section 26 of the Supreme Court of Judicature Act, 1875, it is provided that the fees and percentages appointed to be taken in the High Court of Justice and in the Court of Appeal, and in any Court to be created by any commission, and in any office which is connected with any of those Courts or in which any business connected with any of those Courts is conducted, shall, except so far as they be otherwise directed, be taken by means of stamps; and further, that such stamps shall be impressed or adhesive, as the Treasury may from time to time direct; and that the Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of such stamps.

Now we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do, with the concurrence of the Lord Chancellor, hereby give notice and order and direct—

1. That from and after the 1st November next, being the date fixed for the commencement of this Act, all orders and regulations now in force with respect to the use, proper cancellation, mode of keeping accounts, and allowance of fee stamps in

ORDER AS TO
COURT FEES.

28 Oct.,
1875.

The Court of Chancery,
The several Common Law Courts,
The Court of Probate,
The Court for Divorce and Matrimonial Causes,
The Admiralty Court,

or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in Bankruptcy matters, shall continue in force up to the beginning of the sittings to take place after January next, or until they shall respectively be altered or annulled by any rules hereafter to be made and published in conformity with the Act.

2. That the stamps to be used in the collection of fees and percentages payable under the Order made in pursuance of the powers given by the Supreme Court of Judicature Act, 1875, bearing date this day, shall until further notice be either impressed or adhesive as directed in any previous Order; and in cases to which no previous Order is applicable, shall be either impressed or adhesive, at the option of the parties by whom the fees are payable.

3. That until we do order to the contrary, the dies heretofore in use for impressing stamps in any of the Courts affected by the said Act, and also the adhesive stamps heretofore in use, shall be available and valid for the taking of the said fees and percentages, and may be used notwithstanding that new dies and stamps appropriated to the Supreme Court of Judicature may in the meantime have been issued by the Commissioners of Inland Revenue, which will also be valid and available.

4. That, for such documents in the Chancery, the Queen's

ORDER AS TO
COURT FEES.

28 Oct.,
1875.

Bench, the Common Pleas, and the Exchequer Divisions of the Supreme Court of Judicature as may be, under any existing Rule or Order, stamped with an adhesive stamp or stamps, adhesive stamps appropriated by the words "Judicature Fees" shall be used; Provided always that up to the beginning of the sittings to take place after January next, the adhesive stamps hitherto used in the Courts of Chancery and Common Law shall be available and may be used for such documents in the Supreme Court of Judicature.

5. And that where any of such fees are payable in respect of any matter or thing to be done by any officer or in any office whatever of the Supreme Court of Judicature, and it shall not have been customary or may not be necessary to use any written or printed document or paper in reference to such matter or thing whereon the stamp could be stamped or affixed, the party or his solicitor requiring such matter or thing to be done, shall make application for the same by a præcipe, or short note in writing or print, and a stamp denoting the amount of the fees so payable shall be stamped or affixed to such præcipe or note.

6. That where a fee is payable, but no directions are found in previous Orders as to the document to which the stamp is to be applied, it shall be lawful, until we do otherwise order, for any officer of the Supreme Court whose duty it would be to see that the fee in question is duly paid by means of a stamp, to decide on what document such stamp shall be impressed or affixed.

Given under our hands,

MAHON,
ROW. WINN.

I hereby signify my concurrence in the before-mentioned Rules and Regulations.

CAIRNS, C.

RULES.

At a meeting of the Judges of the Supreme Court, held on the 1st of December, 1875, in pursuance of the Judicature Act, 1875,

Present :

THE RIGHT HONOURABLE THE LORD CHANCELLOR.	VICE-CHANCELLOR MALINS.
THE RIGHT HONOURABLE THE LORD CHIEF JUSTICE of the Common Pleas.	VICE-CHANCELLOR BACON.
THE RIGHT HONOURABLE THE LORD CHIEF BARON.	VICE-CHANCELLOR HALL.
THE RIGHT HONOURABLE THE LORD JUSTICE JAMES.	MR. JUSTICE BLACKBURN.
THE RIGHT HONOURABLE THE LORD JUSTICE MELLISH.	MR. JUSTICE QUAIN.
THE RIGHT HONOURABLE SIR RICHARD BAGGALLAY, Justice of Appeal.	MR. JUSTICE FIELD.
THE RIGHT HONOURABLE SIR ROBERT PHILLIMORE.	MR. JUSTICE BRETT.
THE RIGHT HON. SIR JAMES HANNEN.	MR. JUSTICE GROVE.
	MR. JUSTICE ARCHIBALD.
	MR. BARON BRAMWELL.
	MR. BARON CLEASBY.
	MR. BARON POLLOCK.
	MR. BARON AMPHLETT.
	MR. BARON HUDDLESTON.

the following new Rules of Court and alterations of existing Rules of Court were unanimously agreed to:—

1. The Rules in the first Schedule to the Supreme Court of Judicature Act, 1875, may be cited as "The Rules of the Supreme Court," and the additional Rules of Court made by Order in Council on the 12th day of August, 1875, may be cited as "The Rules of the Supreme Court (Costs)," and these Rules may be cited as "The Rules of the Supreme Court, December, 1875," or each separate one of these Rules may be cited as if it had been one of "The Rules of the Supreme Court," and had been numbered by the number of the Order and Rule mentioned in the margin.

RULES OF
THE
SUPREME
COURT.
Dec. 1875.

2. Form A. in the Appendix to these Rules shall be substituted for the form referred to in Order II., Rule 7, of "The Rules of the Supreme Court."

[ORDER II.]
Rule 7a.
Ante, p. 168.

3. *This Rule is annulled by Rule 4 of the Rules of the Supreme Court, February, 1876. See post, p. 604.*

[ORDER V.]
Rule 11.
Ante, p. 177.

RULES OF
THE
SUPREME
COURT.

Dec. 1875.

[ORDER IX.]

Rule 9.
Ante, p. 189.

4. Order V., Rule 12, of "The Rules of the Supreme Court," is hereby annulled.

5. Order IX., Rule 9, of "The Rules of the Supreme Court," is hereby annulled, and the following shall stand in lieu thereof:

"In Admiralty actions *in rem* the warrant of arrest shall be served by the Marshal or his substitutes, whether the property to be arrested be situate within the port of London or elsewhere within the jurisdiction of the Court, and the Solicitor issuing the warrant shall, within six days from the service thereof, file the same in the Registry."

[ORDER IX.]

Rule 10.
Ante, p. 190.

6. Order IX., Rule 10, of "The Rules of the Supreme Court," is hereby annulled, and the following shall stand in lieu thereof:

"In Admiralty actions *in rem*, service of a writ of summons against ship, freight, or cargo on board, is to be effected by nailing or affixing the original writ for a short time on the mainmast, or on the single mast of the vessel, and on taking off the process, leaving a true copy of it nailed or fixed in its place."

[ORDER XIII.]

Rule 5a.
Ante, p. 212.

7. Where a defendant fails to appear to a Writ of Summons issued out of a District Registry, and the defendant had the option of entering an appearance either in the District Registry or in the London office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought, in due course of post, to have reached him.

[ORDER XIII.]

Rule 10.
Ante, p. 216.

8. Order XIII., Rule 10, of "The Rules of the Supreme Court," is hereby annulled.

[ORDER
XXIII.]

Rule 2.
Ante, p. 231.

9. When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties.

[ORDER
XXXV.]

Rule 11a.
Ante, p. 359.

10. In an Admiralty action *in rem* any person who may have duly intervened and appeared may remove an action from a District Registry as of right.

11. Every District Registry shall account for and pay over to the Treasury, all monies paid into Court at the Registry of which he is Registrar, in such manner and at such times as may be from time to time directed by the Treasury.

RULES OF
THE
SUPREME
COURT.

Dec. 1875.

12. Order XXXVI., Rule 8, of "The Rules of the Supreme Court," shall be read as if the words "to be" had been inserted before the words "entered for trial."

[ORDER
XXXVI.]

Rule 8.
Ante, p. 367.

13. Unless within six days after notice of trial is given the cause shall be entered for trial by one party or the other, the notice of trial shall be no longer in force. This rule is not to apply in any case in which notice of trial has been already given or to trials not in London or Middlesex.

[ORDER
XXXVI.]

Rule 10a.
Ante, p. 371.

14. The first sentence of Order XXXVI., Rule 17, shall be altered as follows:—The party entering the action for trial shall deliver to the officer two copies of the whole of the pleadings in the action, one of which shall be for the use of the Judge.

[ORDER
XXXVI.]

Rule 17.
Ante, p. 373.

In the second sentence the word "Copies" shall be substituted for "Copy."

15. The offices of each District Registrar of the High Court of Justice shall be open on every day and hour in the year on which the offices of the Registrar of the County Court of the place in which the District Registry is situate are required to be kept open.

[ORDER LXI.]

Rule 4a.
Ante, p. 475.

16. *This Rule is repealed by Rules of the Supreme Court, December, 1876, Rule 11. See post, p. 642.*

[ORDER
LVIII.]

Rule 19.
Ante, p. 471.

APPENDIX.

(A.)

FORMS OF
THE
SUPREME
COURT.
Dec. 1875.

Substituted for
form referred
to O. II., R. 7.

Writ of Summons in Admiralty Action in rem.

187 [Here put the letter and number.]

In the High Court of Justice.
Admiralty Division.

Between *A. B.*, plaintiff,
and
the owners of the

Victoria, by the Grace of God, &c.

To the owners and parties interested in the ship or vessel of
the port of [or cargo, &c., as the case may be.]

We command you, that within eight days after the service of this writ, inclusive of the day of such service, you do cause an appearance to be entered for you in the Admiralty Division of Our High Court of Justice in an action at the suit of *A. B.*; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day of 18 .

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be served within (*twelve*) calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The defendant (*or defendants*) may appear hereto by entering an appearance (*or appearances*) either personally or by solicitor at the [] office at

Indorsements to be made on the Writ before Issue thereof.

The plaintiff's claim is for, &c.

This writ was issued by *E. F.*, of [] , solicitor for the said plaintiff, who resides at [] , or, this writ was issued by the plaintiff in person, who resides at [] [mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any.]

Indorsement to be made on the Writ after Service thereof.

This writ was served by *X. Y.* [here state the mode in which the service was effected, whether on the owner, or on the ship, cargo, or freight, according to O. IX., rr. 10, 11, and 12, as the case may be] on the day of 18 .

Signed,
X. Y.

(B.)

Annulled by r. 4 of Rules of Supreme Court, February, 1876, Form A. therein, substituted for this. See p. 606.

ORDER

AS TO

FEEES TO BE TAKEN BY ANY OFFICIAL REFEREES THAT MAY BE ATTACHED TO THE SUPREME COURT.

The Right Honourable HUGH MACCALMONT BARON CAIRNS, Lord High Chancellor of Great Britain, by and with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, doth hereby in pursuance and execution of the powers given by the Supreme Court of Judicature Act, 1875, and all other powers and authorities enabling him in this behalf, order and direct in manner following:—

ORDER AS
TO FEES OF
OFFICIAL
REFEREES.

Feb. 1876.

The fees to be taken by any official referee to be attached to the Supreme Court under the provision of Section 83 of the Supreme Court of Judicature Act, 1873, shall be as follows:—

	£	s.	d.
Upon a reference, for every hour or part of an hour the official referee is occupied	1	1	0

Where the sittings under a reference are to be held elsewhere than in London, there shall be paid, in addition to the above, 1*l.* 11*s.* 6*d.* for every night the official referee, and 15*s.* for every night the official referee's clerk, is absent from London, together with reasonable costs of their locomotion from London and back.

A deposit on account of fees and expenses before proceeding with such reference, or at any time during the course thereof, may be required, and a memorandum thereof shall be delivered to the party making the deposit.

Where the sittings are held elsewhere than in London, the plaintiff in the action shall provide at his expense a place

ORDER AS
TO FEES OF
OFFICIAL
REFEREES.

Feb.1876.

to the satisfaction of the official referee in which the sittings may be held.

Upon the conclusion of the sittings on a reference, the official referee shall forthwith transmit to the Treasury a return, according to the Form annexed, on which shall be affixed stamps equal in amount to the fees and moneys received for such sittings and expenses.

The official referees shall conform to any regulations that may be made from time to time by the Treasury for the accounting for all fees and moneys paid to them.

CAIRNS, C.
G. BRAMWELL.
WM. BALIOL BRETT.
JAMES HANNEN.

February 1st, 1876.

We certify that this Order is made with the concurrence of the Commissioners of Her Majesty’s Treasury.

ROW. WINN.
J. D. H. ELPHINSTONE.

FORM.

HIGH COURT OF JUSTICE.
Division.
In the matter of a reference in
A. v. B.

						Fees and Costs.		
						£.	s.	d.
Sittings held at								
1876.	from	A. M.	to	P. M.	.	.		
„	„	A. M.	to	P. M.	.	.		
„	„	A. M.	to	P. M.	.	.		
Travelled to								
„	from							
Fee for subsistence	nights at		per night =	.	.			
Cost paid by suitor for locomotion	.	.	.	.	.			
						L. M., Official Referee.		
(NOTE.—Stamps of the value of the total to be affixed here.								

It would seem that if ever a trial of an action should occur before an official referee under O. XXXVI., rr. 2 and 3, this scale will still apply, though by the order of April 24th, 1877, it is rescinded as to all matters, questions, or issues, which shall be referred to an official referee from or after the date thereof. It is therefore not expunged here. The last-mentioned order will be found substantially set out, *post*, p. 646.

RULES OF THE SUPREME COURT,

February, 1876.

At a meeting of the Judges of the Supreme Court, held on the 23rd of February, 1876, in pursuance of the Judicature Act, 1875.

RULES OF
THE
SUPREME
COURT.

Feb. 1876.

Present :

THE RIGHT HONOURABLE THE LORD
CHANCELLOR.
THE RIGHT HONOURABLE THE LORD
CHIEF JUSTICE OF ENGLAND.
THE RIGHT HONOURABLE THE MASTER
OF THE ROLLS.
THE RIGHT HONOURABLE THE LORD
CHIEF BARON.
THE RIGHT HONOURABLE THE LORD
JUSTICE MELLISH.
THE RIGHT HONOURABLE SIR RICHARD
BAGGALLAY, Justice of Appeal.
THE RIGHT HONOURABLE SIR ROBERT
PHILLIMORE.
THE RIGHT HONOURABLE SIR JAMES
HANNEN.
VICE-CHANCELLOR MALINS.

VICE-CHANCELLOR BACON.
MR. JUSTICE BLACKBURN.
MR. JUSTICE MELLOR.
MR. JUSTICE LUSH.
MR. JUSTICE QUAIN.
MR. JUSTICE FIELD.
MR. JUSTICE BRETT.
MR. JUSTICE GROVE.
MR. JUSTICE DENMAN.
MR. JUSTICE LINDLEY.
MR. JUSTICE ARCHIBALD.
MR. BARON BRAMWELL.
MR. BARON CLEASBY.
MR. BARON POLLOCK.
MR. BARON AMPHLETT.
MR. BARON HUDDLESTON.

The following new Rules of Court and alterations of existing Rules of Court were unanimously agreed to, and ordered to be in force on and after the 3rd day of March, 1876.

1. These Rules may be cited as "The Rules of the Supreme Court, February, 1876," or each separate one of these Rules may be cited as if it had been one of "The Rules of the Supreme Court," and had been numbered by the number of the Order and Rule mentioned in the margin.

ORDER IV.

INDORSEMENT OF ADDRESS.

2. Notwithstanding anything to the contrary contained in Order IV. of "The Rules of the Supreme Court," Rules 1

[ORDER IV.]

Rule 2a.
Ante, p. 173.

RULES OF
THE
SUPREME
COURT.

Feb. 1876.

[ORDER IV.]

Rule 3a.
Ante, p. 174.

and 2 of such Order shall only apply where the writ of summons is issued out of the London Office.

3. Order IV., Rule 3, is hereby annulled, and the following shall stand in lieu thereof :

In all cases where a writ of summons is issued out of a district registry the solicitor shall give on the writ the address of the plaintiff, and his own name or firm and his place of business, which shall, if his place of business be within the district of the registry, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar ; and where the solicitor issuing the writ is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. Where the plaintiff sues in person, he shall give on the writ his place of residence and occupation, which shall, if his place of residence be within the district, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar.

ORDER V.

ISSUE OF WRITS OF SUMMONS.

[ORDER V.]

Rule 11 (a).
Ante, p. 177.

4. Rule 3 of "The Rules of the Supreme Court, December, 1875," is hereby annulled, and the following rule substituted :—

The first paragraph of Rule 11 of Order V. of "The Rules of the Supreme Court" is hereby annulled, and the following shall stand in lieu thereof :

"In Admiralty Actions *in rem* a warrant for the arrest of property according to the Form A. in the Appendix to these rules may be issued at the instance either of the plaintiff or of the defendant at any time after the writ of summons has issued, but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed, and the following provisions complied with."

ORDER XII.

APPEARANCE.

RULES OF
THE
SUPREME
COURT.**Feb. 1876.**

[ORDER XII.]

Rule 6 (a).
Ante, p. 197.

5. Order XII., Rule 6, is hereby annulled, and the following shall stand in lieu thereof:

"A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing, dated on the day of delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person.

"A defendant who appears elsewhere than where the writ is issued, shall on the same day give notice of his appearance to the plaintiff's solicitor or to the plaintiff himself if he sues in person, either by notice in writing served in the ordinary way at the address for service within the district of the district registry, or by prepaid letter directed to such address, and posted on that day in due course of post."

ORDER XXVII.

AMENDMENT OF PLEADINGS.

6. The Court, or a Judge, may at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner, and on such terms, as may seem just.

[ORDER
XXVII.]Rule 11.
Ante, p. 288.

ORDER LV.

COSTS.

7. In any cause, or matter, in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such matter and form as the Court or a Judge shall direct (a).

[ORDER LV.]

Ante, p. 450.

ORDER LVII.

TIME.

8. In Admiralty actions the Court or a Judge shall have power at any stage of the proceedings in such action, upon a

[ORDER LVII.]

Rule 7.
Ante, p. 453.

(a) See *Rourke v. White Moss Colliery Co.*, 1 C. P. D. 556; *Republic of Costa Rica v. Erlanger*, 3 Ch. D. 62; 34 L. T. N. S. 675; 35 L. T. N. S. 19; 24 W. R. 955.

RULES OF
THE
SUPREME
COURT.
Feb. 1876.

motion or summons by either party, calling upon the other party to show cause why the trial of such action should not take place on an early day to be appointed by the Court or a Judge, to appoint that such trial shall take place on any day or within any time which to the Court or Judge shall seem fit; and for such purpose the Court or Judge shall have power upon such motion or summons to dispense with the giving of notice of trial, or to abridge the time or times appointed by these rules for giving such notice, for the delivery of pleadings, or for doing any other act or taking any other proceeding in the action, upon such terms (if any) as the nature of the case may require.

ORDER LXI.

SITTINGS AND VACATIONS.

[ORDER LXI.] 9. The offices of the Supreme Court (including the Judges' chambers) shall close on Saturdays at 2 o'clock.
Rule 4 (a).
Ante, p. 475.

[ORDER LXI.] 10. The Official Referees shall sit at least from 10 a.m. to 4 p.m. on every day during the Michaelmas, Hilary, Easter, and Trinity sittings of the High Court of Justice, except on Saturdays, during such sittings, when they shall sit, at least, from 10 a.m. to 2 p.m.; but nothing in this rule shall prevent their sitting on any other days.
Rule 10.
Ante, p. 476.

(A.)

Warrant of Arrest in Admiralty Action in rem.

187 [Here put the letter and number.]

Ante, p. 600. In the High Court of Justice.
Admiralty Division.

Between A. B., plaintiff,
and
the owners of the
Victoria, &c.

To the Marshal of the Admiralty Division of Our High Court of Justice, and to all and singular his substitutes [or To the collector or collectors of customs at the port of]. We hereby command you to arrest the ship or vessel of the port of [and the cargo and freight, &c., as the case may be], and to keep the same under safe arrest, until you shall receive further orders from us. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day of 18 .

REGULÆ GENERALES (a).

ADMIRALTY DIVISION.

The Judge having considered various applications in actions recently tried in this Division for the allowance of the fees set forth in the column headed "Higher Scale" in the Schedule to the Order VI. of the Additional Rules of Court, made and issued by order in Council of the 12th of August, 1875, has directed that the fees on the higher scale are to be allowed as a general rule (always open to exception) as follows:—

In actions for salvage when £1000 or upwards is awarded.

In actions for damage by collision to plaintiffs when £1000 or upwards is recovered, exclusive of interest.

To defendants when £2000 or upwards is claimed by plaintiffs.

But in any case in which the fees on the higher scale are sanctioned, the taxing officer is to exercise a discretion as to the extent to which those under the heads of appearances, instructions, perusals, and attendances are to be allowed.

(Signed) ROBT. PHILLIMORE.

April 3rd, 1876.

(a) 1 P. D. 491.

ORDER

AS TO THE

FEES AND PERCENTAGES

WHICH ARE REQUIRED TO BE TAKEN IN THE
SUPREME COURT OF JUDICATURE BY
MEANS OF STAMPS.

April 22nd, 1876.

ORDER AS
TO FEES
AND PER-
CENTAGES.
22 April,
1876.

WHEREAS by Section 26 of the Supreme Court of Judicature Act, 1875, it is provided that the fees and percentages appointed to be taken in the High Court of Justice and in the Court of Appeal, and in any Court to be created by any Commission, and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, shall, except so far as they be otherwise directed, be taken by means of stamps; and further, that such stamps shall be impressed or adhesive, as the Treasury may from time to time direct; and that the Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of such stamps, and for keeping accounts of such stamps.

And whereas by an order made under the same section of the said Act on the 28th day of October, 1875, it was (amongst other things) provided that the stamps to be used in the collection of the fees and the percentages therein mentioned should, until further notice, be either impressed or adhesive as directed in any previous order, and in cases to which no previous order was applicable should be either impressed or adhesive, at the option of the parties by whom

the fees were payable; and it was also provided that up to the beginning of the sittings on the 25th day of April 1876, the adhesive stamps used before the publication of the said order in the Courts of Chancery and Common Law should be available, and might be used, in the Supreme Court of Judicature.

ORDER AS
TO FEES
AND PER-
CENTAGES.

22 April,
1876.

And whereas it is expedient to further extend the use of the same stamps, and to make other provisions in lieu of, and in addition to, those contained in the said order of the 28th day of October, 1875,

Now, we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do, with the concurrence of the Lord Chancellor, hereby give notice, and order and direct:—

1. That from and after the 25th day of April, 1876, the stamps used for denoting the said fees and percentages shall be of the character, and be applied and otherwise dealt with, as prescribed by the schedule hereto.

2. That the adhesive stamps at present in use in the Supreme Court of Judicature shall continue to be used so long as they are supplied by the Commissioners of Inland Revenue.

3. That in any case in which a deposit on account of probable fees and expenses is required, the following regulations shall be observed:—

AS TO DEPOSITS.

(a.) The party, or his solicitor, from whom under any Order as to Court fees a deposit may be required, shall, before the matter or cause be proceeded with, present for the signature of the officer of the Court requiring the deposit, a certificate, duly stamped, for the amount of such deposit. Forms of certificates provided by the Commissioners of Inland Revenue may be obtained at the Inland Revenue Office, Somerset House, or at such other places as the Commissioners may appoint.

(b.) When the fees and expenses are ascertained, the said officer of the Court shall endorse upon the said certificate the amount thereof.

(c.) If the amount is in excess of the deposit, the certificate, bearing an additional stamp equal to the excess, must be produced to the said officer before

ORDER AS
TO FEES
AND PER-
CENTAGES.
22 April,
1876.

he delivers his judgment or award, or gives his decision in the matter or cause.

(d.) If the amount of the fees and expenses is less than the deposit, the holder of the certificate may obtain repayment of the difference upon presenting the certificate so endorsed at the Inland Revenue Office, Somerset House.

The SCHEDULE above referred to.

SUMMONSES, WRITS, COMMISSIONS, AND WARRANTS.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On sealing a writ of summons for commencement of an action .	Writ of summons.	Impressed or adhesive.	{ Forms of writ with the impressed stamp will be sold at the Inland Revenue Office and by Law Stationers.
On sealing a concurrent, renewed, or amended writ of summons for commencement of an action			
On sealing a notice for service under O. XVI, r. 18.	Notice .	Impressed or adhesive.	Forms with the impressed stamp will be sold at the Inland Revenue Office and by Law Sta- tioners.
On sealing a writ of man- damus or injunction .	{ Præcipe left at time of issuing writ .	{ Impressed .	{ Præcipes with the im- pressed stamp will be sold at the Inland Revenue Office and by Law Stationers.
On sealing a writ of sub- pœna not exceeding three persons			
On sealing every other writ			
On sealing a summons to originate proceedings in the Chancery Division.	Summons .	Impressed .	A form of summons will be sold at the Inland Revenue Office and by Law Stationers.
On sealing a duplicate thereof.	Duplicate summons.	Impressed .	
On sealing a copy of same for service.	Copy of summons.	Impressed or adhesive.	
On sealing or issuing any other summons or war- rant.	Summons .	Impressed or adhesive.	
On sealing or issuing a commission to take oaths or affidavits in the Supreme Court.	Commission.	Impressed .	Forms of commission with the impressed stamp will be sold at the Inland Revenue Office.
Every other commission .	Commission.	Impressed .	{ The commission or the copy of petition to be written on impressed paper, or the docu- ment to be produced at the Inland Revenue to be stamped.
On marking a copy of a petition of right for service.	Copy of petition .	Impressed .	

*Appearances.*ORDER AS
TO FEES
AND PER-
CENTAGES.22 April,
1876.

The fee payable on entering an appearance to be denoted by an impressed stamp on the form of memorandum as prescribed by the Appendix to the Supreme Court of Judicature Act, 1875, and where the appearance of more than one person is entered by the same memorandum, the fees for all persons beyond the first to be denoted by means of impressed or adhesive stamps.

Forms of memorandum of appearance with the impressed stamp for one or more defendants will be sold at the Inland Revenue Office and by law stationers.

COPIES.

	Document to be Stamped.	Character of Stamp to be used.
For a copy of a written deposition of a witness to enable a party to print the same.	Copy . . .	Impressed or adhesive.
For examining a written or printed copy, and marking same as an office copy.	Copy . . .	Impressed or adhesive.
For making a copy, and marking same as an office copy.	Copy . . .	Impressed or adhesive.
For a copy in a foreign language . . .	Copy . . .	Impressed or adhesive.
For a copy of a plan, map, section, drawing, photograph, or diagram.	Præcipe or copy .	Impressed or adhesive.
For a printed copy of an order, not being an office or certified copy.	Copy . . .	Impressed or adhesive.

Attendances.

The fees payable under this heading to be denoted either by an impressed or adhesive stamp on the subpoena, notice, or other document requiring the attendance of the officer.

If the officer's attendance be required beyond one day, the additional fee per diem after the first to be taken by means of a præcipe with the impressed stamp, filed in the department from which the officer is summoned.

ORDER AS
TO FEES
AND PER-
CENTAGES.

**22 April,
1876.**

OATHS, &c.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, on which no fee is payable.	Affidavit or other document answering thereto.	Impressed or adhesive.	

—	Document to be Stamped, and Character of Stamp to be used.	Regulations and Observations.
And in addition thereto, for each exhibit therein referred to and required to be marked.	Stamp to be impressed or adhesive on exhibit if practicable, but if not, to be impressed on præcipe filed.	

FILING.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On filing a special case or petition of right.	Special case, petition of right, or præcipe.	Impressed .	Where practicable stamp to be on special case or petition of right, and in other cases on præcipe filed.
On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, warrant of attorney, cognovit, bail, satisfaction piece, and writ of execution with return.	Document filed .	Impressed or adhesive.	
On filing a scheme pursuant to the statute 30 & 31 Vict. c. 127, or the Liquidation Act, 1868.	Scheme .	Impressed.	
On filing a caveat .	Caveat .	Impressed.	

CERTIFICATES.

ORDER AS
TO FEES
AND PER-
CENTAGES.22 April,
1876.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For a certificate of appearance, or of a pleading, affidavit, proceeding having been entered, filed, or taken, or of the negative thereof.	Certificate .	Impressed or adhesive.	Forms of certificate with the impressed stamp will be sold at the Inland Revenue Office and by law stationers.

Searches and Inspections.

The fees on searches and inspections to be taken by means of impressed stamps on a form which will be issued at the Inland Revenue Office, and sold there, and by law stationers.

Examination of Witnesses.

The fees under this heading may still be denoted by means of adhesive stamps, which may be affixed either to the deposition or to the order or application paper for examination.

HEARING.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For entering or setting down, or re-entering or resetting down, an appeal to the Court of Appeal, or a cause for trial or hearing in any Court in London or Middlesex, or at any Assizes, including a demurrer, special case, and petition of right, but not any other petition, nor a summons adjourned from Chambers.	{ In the Registry Office, Chancery Division, on forms provided for the purpose . At offices of Associates on copy of pleadings . At all other offices of the High Court or Court of Appeal on præcipe .	{ Impressed . { Impressed or adhesive. { Impressed.	{ Forms, with the impressed stamp, will be sold at the Inland Revenue, and at the Registrar's Office, Chancery Division.
For certificate of an Associate of the result of trial.	Certificate .	Impressed or adhesive.	

ORDER AS
TO FEES
AND PER-
CENTAGES.22 April,
1876.

JUDGMENTS, DECREES, AND ORDERS.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For drawing up and entering a judgment, or decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at Chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal.	Judgment or order.	Stamp to be impressed or adhesive on the judgment or order, except at the Crown Office, where, as far as practicable, a præcipe, with the impressed stamp, should be used.	
For drawing up and entering any other order, whether made in Court or at Chambers.	Order . . .	Impressed or adhesive.	
For copy of a plan, map, section, drawing, photograph, or diagram required to accompany any order.	Copy . . .	Impressed or adhesive.	Where an adhesive stamp would damage the copy, a præcipe with the impressed stamp should be used.

Taking Accounts.

The fees payable under this heading when taken on the accounts to be denoted by means of adhesive stamps affixed to the accounts or by impressed stamps on paper to be left at the office, but when taken on a certificate they may be denoted either by impressed or adhesive stamps.

TAXATION OF COSTS.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For taxing a bill of costs	Stamp to be adhesive on bill of costs, but where a certificate, allocatur, or præcipe is used, the fee to be denoted by impressed stamps.		
For a certificate or allocatur of the result, not being a judgment.	Certificate or allocatur.	Impressed.	

PETITIONS.

ORDER AS
TO FEES
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CENTAGES.22 April,
1876.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For answering a petition for hearing in Court, and setting down.	Petition . .	Impressed or adhesive.	
For answering a non-at- tendable petition, not being a petition for an order of course.	Petition . .	Impressed or adhesive.	
On a matter of course order on a petition of right.	Order . .	Impressed or adhesive.	
On an order for a com- mission on a petition of right.	Order . .	Impressed.	

REGISTER OF JUDGMENTS AND LIS PENDENS.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For registering a judg- ment or lis pendens .	Memorandum of registry .	Impressed .	{ Forms with the im- pressed stamp will be sold at the Office of the Registrar of Judgments, Com- mon Pleas Division.
For re-registering same .			
For a search			
For a certificate of entry of satisfaction.	General form of search præcipe Certificate .		
For a certificate of a judg- ment for registration in Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit .	Certificate .	Impressed or adhesive .	
On filing for registration a certificate issued out of Courts of Dublin or Court of Session in Scotland under the same Act			
On every certificate of the entry of a satisfac- tion under the same Act .			
For a search made in one or both of the Registers of Irish and Scotch Judgments.	Præcipe . .	Impressed .	Forms of Præcipe, with the impressed stamp, will be sold at the Inland Revenue Office, and by law stationers.

ORDER AS
TO FEES
AND PER-
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1876.

MISCELLANEOUS.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On a report of a Private Bill in Parliament.	Report . .	Impressed.	
On an allowance of bye-laws or table of fees.	Allowance . .	Impressed.	
On a fiat of a Judge .	Fiat . .	Impressed or adhesive.	
On signing an advertisement.	Advertisement.	Impressed.	
Upon a reference to a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions, for the purpose of any investigation or inquiry other than the taking of an account for which another fee is herein provided.	Certificate or other document used in giving the decision.	Impressed or adhesive.	
On taking acknowledgment of a deed by a married woman.	Acknowledgment . .	Impressed .	Forms with the impressed stamp will be sold at the Inland Revenue Office.
On taking a recognizance or bond.	Recognizance .	Impressed or adhesive .	
On taking bail, and taking same off the file and delivering.	Bail piece .	Impressed or adhesive .	
On a commitment . .	Commitment .	{ Impressed or adhesive	
On an application to produce Judges' notes .	Application .		
On appointment of Commissioners under glebe exchange	Appointment .	Impressed.	
On examining and signing inrolments of decrees and orders.	Inrolment .	Impressed or adhesive.	
On admission or re-admission of a solicitor.	Admission .	Impressed .	Forms of admission with the impressed stamp will be sold at the Inland Revenue Office.
On a written request for information at the Chancery Pay Office.	Præcipe . .	{ Impressed.	
For preparing a power of attorney at the Chancery Pay Office.	Power . .		
For transcript of an account in the books at the Chancery Pay Office.	Transcript .	Impressed or adhesive.	
Any other proceeding, pleading, or document not herein-before specified.	Document or Præcipe.	Impressed or adhesive .	These are to be impressed, if practicable, where not filed in the office.

General Directions.

In any case in which the use of impressed stamps is prescribed, paper or parchment on which the document requiring a stamp is to be written may be stamped at the Inland Revenue Office, notwithstanding that stamped forms are also provided by the Commissioners of Inland Revenue.

The cancellation shall be effected in such manner as the Commissioners of Inland Revenue shall from time to time direct.

CRICHTON.

J. D. H. ELPHINSTONE.

I concur in this Order.

CAIRNS, C.

ORDER AS
TO FEES
AND PER-
CENTAGES.22 April,
1876.

RULES OF THE SUPREME COURT,

June, 1876.

At a meeting of the Judges of the Supreme Court, held on the 26th of June, 1876, in pursuance of the Judicature Act, 1875.

Present :

THE RIGHT HONOURABLE THE LORD CHANCELLOR.	VICE-CHANCELLOR MALINS.
THE RIGHT HONOURABLE THE LORD CHIEF JUSTICE OF ENGLAND.	VICE-CHANCELLOR BACON.
THE RIGHT HONOURABLE THE MASTER OF THE ROLLS.	VICE-CHANCELLOR HALL.
THE RIGHT HONOURABLE THE LORD CHIEF JUSTICE OF THE COMMON PLEAS.	MR. BARON BRAMWELL.
THE RIGHT HONOURABLE THE LORD CHIEF BARON.	MR. JUSTICE BLACKBURN.
THE RIGHT HONOURABLE THE LORD JUSTICE JAMES.	MR. JUSTICE MELLOR.
THE RIGHT HONOURABLE THE LORD JUSTICE MELLISH.	MR. JUSTICE LUSH.
THE RIGHT HONOURABLE SIR RICHARD BAGGALLAY.	MR. BARON CLEASBY.
THE RIGHT HONOURABLE SIR JAMES HANNEN.	MR. JUSTICE GROVE.
	MR. JUSTICE QUAIN.
	MR. JUSTICE DENMAN.
	MR. JUSTICE ARCHIBALD.
	MR. BARON POLLOCK.
	MR. BARON AMPHLETT.
	MR. JUSTICE FIELD.
	MR. BARON HUDDLESTON.
	MR. JUSTICE LINDLEY.

The following new Rules of Court and alterations of existing Rules of Court were unanimously agreed to, and ordered to be in force on and after the 17th day of July, 1876.

RULES OF
THE
SUPREME
COURT.
**June,
1876.**

1. These rules may be cited as "The Rules of the Supreme Court, June, 1876," or each separate one of these rules may be cited as if it had been one of "The Rules of the Supreme Court," and had been numbered by the number of the order and rule mentioned in the margin.

ORDER II.

WRIT OF SUMMONS AND PROCEDURE.

[ORDER II.]

Rule 3 (a).
Ante, p. 157.

2. Forms 2 and 3 in Part 1 of Appendix A to "The Rules of the Supreme Court" shall be read as if the words "by leave of the Court or a Judge" were not therein.

ORDER V.

ISSUE OF WRITS OF SUMMONS.

3. The following words are hereby added to the end of Order V., Rule 8, of "The Rules of the Supreme Court" :—
 "And when such action shall be commenced in a district registry, it shall be further distinguished by the name of such registry."

RULES OF
THE
SUPREME
COURT.

June,
1876.

[ORDER V.]

Rule 8.
Ante, p. 177.

ORDER IX.

SERVICE OF WRIT OF SUMMONS.

4. Where one person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on upon any person having at the time of service the control or management of the business there ; and, subject to any of the Rules of the Supreme Court, such service shall be deemed good service on the person so sued.

[ORDER IX.]

Rule 6 (a).
Ante, pp. 188,
189.

ORDER XI.

SERVICE OUT OF THE JURISDICTION.

5. Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract wherever made, the Judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in

[ORDER XI.]

Rule 1 (a).
Ante, pp. 193,
194.

RULES OF
THE
SUPREME
COURT.

June,
1876.

England or in the place of such defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the Judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shown.

ORDER XII.

APPEARANCE.

[ORDER XII.]

Rule 12 (a).
Ante, pp. 198,
199.

6. Where any person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

ORDER XVI.

PARTIES.

[ORDER XVI.]

Rule 9 (a).
Ante, pp. 230,
231.

7. In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court may put upon an instrument, and it shall not be known or be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court shall consider that in order to save expense or for some other reason it will be convenient to have the question or questions of construction determined before such heir-at-law, next of kin, or class shall have been ascertained by means of inquiry or otherwise, the Court may appoint some one or more person or persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court in the presence of such person or persons shall be binding upon the party or parties or class so represented.

[ORDER XVI.]

Rule 10 (a).
Ante, p. 232.

8. Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm.

ORDER XIX.

PLEADING GENERALLY.

9. In Order XIX., Rule 5, of "The Rules of the Supreme Court," the word "ten" is hereby substituted for the word "three" before the word "folios."

RULES OF
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SUPREME
COURT.

June,
1876.

[ORDER XIX.]

Rule 5 (a).
Ante, p. 259.

ORDER XXIII.

DISCONTINUANCE.

10. A defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued.

[ORDER
XXIII.]

Rule 2.
Ante, p. 281.

ORDER XXXI.

DISCOVERY AND INSPECTION.

11. In Order XXXI., Rule 7, of "The Rules of the Supreme Court," the word "ten" is hereby substituted for the word "three" before the word "folios."

[ORDER
XXXI.]

Rule 7 (a).
Ante, p. 342.

ORDER XXXV.

PROCEEDINGS IN DISTRICT REGISTRIES.

12. Order XXXV., Rule 1, of "The Rules of the Supreme Court" is hereby annulled, and the following shall stand in lieu thereof:—

[ORDER
XXXV.]

Rule 1 (a).
Ante, pp. 355,
356.

1. Where an action proceeds in the district registry all proceedings, except where by any of the rules of the Supreme Court it is otherwise provided, or the Court or a Judge shall otherwise order, shall be taken in the district registry, down to and including final judgment, and every final judgment and every order for an account by reason of the default of the defendant or by consent shall be entered in the district registry in the proper book, in the same manner as a like

RULES OF
THE
SUPREME
COURT.

June,
1876.

judgment or order in an action proceeding in London would be entered in London.

Where the writ of summons is issued out of a district registry and the plaintiff is entitled to enter interlocutory judgment under Order XIII., Rule 6, or where the action proceeds in the district registry and the plaintiff is entitled to enter interlocutory judgment under Order XXIX., Rule 4 or 5, in either case such interlocutory judgment, and when damages shall have been assessed, final judgment shall be entered in the district registry, unless the Court or Judge shall otherwise order.

Where an action proceeds in the district registry, final judgment shall be entered in such registry, unless the Judge at the trial or the Court or a Judge shall otherwise order.

Actions in the Queen's Bench, Common Pleas, and Exchequer Divisions shall be entered for trial with the associates and not in the district registries.

ORDER XXXVI.

TRIAL.

[ORDER
XXXVI.]

Rule 4 (a).
Ante, p. 366.

13. The defendant, instead of giving notice of trial, may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or Judge may seem just.

[ORDER
XXXVI.]

Rule 29 (a).
Ante, p. 377.

14. The business to be referred to the official referees appointed under the Supreme Court of Judicature Act, 1873, shall be distributed among such official referees in rotation by the clerks to the registrars of the Supreme Court, Chancery Division, in like manner in all respects as the business referred to conveyancing counsel appointed under the Act of the 15th and 16th Vict., cap. 80, section 41, is directed to be distributed by the second of the Consolidated General Orders of the Court of Chancery.

[ORDER
XXXVI.]

Rule 29 (b).
Ante, pp. 377,
378.

15. When an order shall have been made referring any business to the official referee in rotation, such order, or a duplicate of it, shall be produced to the registrar's clerk,

whose duty it is to make such distribution as aforesaid ; and such clerk shall (except in the case provided for by Rule 29c of this order), endorse thereon a note specifying the name of the official referee in rotation to whom such business is to be referred ; and the order so endorsed shall be a sufficient authority for the official referee to proceed with the business so referred.

RULES OF
THE
SUPREME
COURT.

June,
1876.

16. The two last preceding rules of this order are not to interfere with the power of the Court, or of the Judge at Chambers, to direct or transfer a reference to any one in particular of the said official referees, where it appears to the Court or the Judge to be expedient ; but every such reference or transfer shall be recorded in the manner mentioned in Rule 2 of the second of the said Consolidated General Orders, and a note to that effect be endorsed on the order of reference or transfer ; and in case any such reference or transfer shall have been or shall be made to any one in particular of the said referees, then the clerk in making the distribution of the business according to such rotation as aforesaid shall have regard to any such reference or transfer.

[ORDER
XXXVI.]

Rule 29 (c).
Ante, p. 378.

ORDER XLII.

EXECUTION.

17. Order XLII, Rule 10, of "The Rules of the Supreme Court" shall be read as if the words "or on behalf of" had been inserted after the words "signed by."

[ORDER
XLII.]

Rule 10.
Ante, p. 400.

ORDER LI.

TRANSFERS AND CONSOLIDATION.

18. When an order has been made by any Judge of the Chancery Division for the winding up of any company under the Companies Acts, 1862 and 1869, or for the administration of the assets of any testator or intestate, the Judge in whose Court such winding up or administration shall be pending shall have power, without any further consent, to order the transfer to such Judge of any action pending in

[ORDER LI.]

Rule 2 (a).
Ante, p. 433.

RULES OF
THE
SUPREME
COURT.

June,
1876.

any other division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered, as the case may be.

ORDER LIV.

APPLICATIONS AT CHAMBERS.

[ORDER LIV.]

Rule 2 (a).
Ante, pp. 446,
447.

19. The authority and jurisdiction of the district registrar or of a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions shall not extend to granting leave for service out of the jurisdiction of a writ of summons or of notice of a writ of summons.

RULES OF THE SUPREME COURT (COSTS).

Ante, p. 565.

20. The Schedule to "The Rules of the Supreme Court (Costs)" is hereby altered in the following particulars:—

The allowance for printing a document not exceeding ten folios shall be 10s., and, in addition, for every twenty beyond the first twenty copies of any document not exceeding twenty-four folios, 2s.

APPELLATE JURISDICTION ACT, 1876.

—♦—
FORM OF APPEAL, METHOD OF PROCEDURE, AND
STANDING ORDERS APPLICABLE TO ALL APPEALS
PRESENTED TO THE HOUSE OF LORDS ON AND
AFTER THE 1ST DAY OF NOVEMBER, 1876.

ORDERS
UNDER THE
APPELLATE
JURISDIC-
TION ACT.

Nov.
1876.

To the Right Honourable the Lords Spiritual and Temporal
in Parliament assembled.

Form of Ap-
peal (Standir.
Order No. 1.)

The humble petition and appeal of *A.*

Your petitioner humbly prays that the matter of the
order (*or orders, or judgment, or interlocutor,*) set
forth in the schedule hereto * (*or, so far as therein*
stated to be appealed against) may be reviewed
before Her Majesty the Queen in her court of
Parliament, and that the said order (*or, so far as*
aforesaid) may be reversed, varied, or altered, or
that the petitioner may have such other relief (*if*
specific relief be desired, it can be so stated in the
prayer) in the premises as to Her Majesty the
Queen, in her court of Parliament, may seem meet;
and that (*here name the respondents*) may be
required to lodge such printed cases as they may
be advised, and the circumstances of the cause may
require, in answer to this Appeal; and that service
of such order on the solicitors in the cause of the
said respondents may be deemed good service.

* *Note.*—The
schedule must
set out the
title of the
parties to the
cause or
matter; and
the decrees,
orders, judg-
ments, or in-
terlocutors ap-
pealed against,
and where the
appeal is not
against the
whole decree
the part ap-
pealed against
must be de-
fined.

To be signed by two counsel.

(Here insert schedule.)

Standing Order
No. II. (Cer-
tificate of
Counsel).
Post, p. 629.

THE FORM OF SCHEDULE ANNEXED ORIGINALLY TO THIS
HAS BEEN REPEALED, AND THE FOLLOWING SUBSTITUTED.

FORM OF SCHEDULE.

"From Her Majesty's Court of Appeal (England).

"In a certain cause (or matter) wherein *A.* was plaintiff and *B.* was
defendant.

ORDERS
UNDER THE
APPELLATE
JURISDICTION
ACT.Nov.
1876.

Notice to respondents to be written on the last page of the appeal.

Note.—Not less than two clear days notice to be given of the intention to present an appeal.

"The order appealed from is in the words following, viz. (*set forth order complained of in Italics*), or, the order referred to in the above prayer, is in the words following, the portion appealed from being printed in Italics (*set forth order, the portion complained of being printed in Italics*, the portion not complained of being printed in Roman type)."

We humbly conceive this to be a proper case to be heard before your Lordships by way of appeal.

[*Standing Order No. II.*] To be signed by two counsel.
I, _____, clerk to Messrs. _____, of _____, solicitors for the appellants within-named, hereby certify that on the _____ day of _____ I served Messrs. _____ of _____, solicitors for _____, the within-named respondents, with a correct copy of the foregoing appeal, and with a notice that on the _____ day of _____, or as soon after as conveniently may be, the petition of appeal would be presented to the House of Lords on behalf of the appellant.

DIRECTIONS FOR AGENTS.

METHOD OF PROCEDURE.

Presentation of the appeal.

Order of Service,—see Standing Order No. III. *Post*, p. 630.

Security for Costs,—see Standing Order No. IV. *Post*, p. 630.

In accordance with the foregoing notice, the appeal, printed on *parchment (quarto size)*, in such form as will enable paper copies thereof to be hereafter bound up with the printed cases, is to be lodged in the Parliament office for presentation to the House, and (if the House be then sitting, or if not, on the next ensuing meeting of the House,) an order thereon for service on the respondents, or their solicitors, ordering the respondents to lodge cases in answer to the appeal, will be issued to the appellant's agent, such order, together with an affidavit of due service entered thereon, to be returned to the Parliament Office *within* the period granted to the appellant for lodging his printed case, under Standing Order No. V.

Each appellant, where there are more than one, is required to enter into the recognizance. The appellants are required to submit to the clerk of the parliaments within one week after the date of the presentation of the appeal (unless the sum of two hundred pounds, as required by the standing order, be paid to the receiver of fees to the Parliament Office for payment into the fee fund of the House of Lords,*) the names of the sureties who propose entering into the *bond*; and, in the event of a substitute being proposed to enter into the recognizance in lieu of the appellants, the name of

* All drafts and cheques to be made payable to "House of Lords Fee Fund," and to be crossed, "Bank of England, Western Branch."

such substitute. *Two clear days previous notice* of the names so proposed (for bond and recognizance) is to be given to the solicitor or agent of the respondents, and at the time of submitting the said names to the clerk of the Parliaments, a certificate from the solicitor or agent of the appellants is to be lodged in the Parliament Office, certifying his belief in the sufficiency of the sureties and substitute so proposed. At the termination of one week from the lodgment of such certificate, the *bond* and *recognizance* are to be issued to the solicitor or agent of the appellants for execution before a commissioner appointed to administer oaths in the Supreme Court of Judicature in England, or a commissioner appointed to administer oaths in chancery in Ireland, or before a Justice of the Peace in Scotland. The bond and the recognizance (whether entered into by the appellants or by a substitute) to be returned to the Parliament Office within one week from the date of the issue thereof to the solicitor or agent of the appellants.

The solicitors of those respondents who purpose lodging printed cases in answer to the appeal should attend at the Parliament office for the purpose of ascertaining the due execution of the recognizance and bond, and entering their names in the appearance book. (Notice of the meeting of the Appeal Committee is only sent to the solicitors of respondents who have thus signified their appearance in the cause.)

In English appeals six weeks time, and in Irish and Scotch appeals eight weeks time, from the date of the presentation of the appeal, is granted to all parties to lodge printed cases and the appendices thereto.*

In appeals in which the parties are able to agree in their statement of the subject-matter, it is optional to lodge a *joint* case with reasons *pro* and *con.*, following the practice heretofore in use in Common Law appeals on a special case.

It is obligatory on the appellant, within the respective periods so limited as above, to lodge his printed cases, or the joint case before mentioned, and a printed appendix consisting of such documents, or parts thereof, used in evidence in the Court below, as may be necessary for reference on the argument of the appeal.

ORDERS
UNDER THE
APPELLATE
JURISDIC-
TION ACT.

Nov.
1876.

Printed cases and Appendix, and "setting down" cause for hearing,—see Standing Order No. V. *Post*, p. 631.

Appendix.

* Petitions for extension of time, *lodged* during the Recess, do not prevent the dismissal of an Appeal. (For form of Petition see Appendix C., *post*, p. 635.)

ORDERS
UNDER THE
APPELLATE
JURISDIC-
TION ACT.

Nov.
1876.

It is the duty of the appellant, with as little delay as possible after the presentation of the appeal, to furnish to the respondent a list of the proposed documents, and in due course a proof copy of the appendix. The proof is to be examined with the original documents by the respective solicitors of the parties. (Ten copies of the appendix, as soon as printed, to be delivered to the solicitor of the respondent.) The respondent is allowed to print any *additional* documents, used in evidence in the Court below, which may be necessary for the support of his case on the argument of the appeal, such documents to be paged consecutively with the appendix. (The proof to be examined, as aforesaid, by the respective solicitors, and prints delivered to the solicitor of the appellant.)

The costs incurred in printing the appendix will, in the first instance, be borne by the appellant, and the cost of the *additional* documents by the respondent, but these costs will ultimately be subject to the decision of the House with regard to the costs of the appeal.

Signature of
counsel to
case,—see
Standing Order
No. V.
Post, p. 631.

The case and appendix must be printed quarto size, with seven or eight letters in the margin for facilitating reference, and should be submitted *in proof* to the clerks in the Judicial Office. Forty copies of the case and appendix are required to be lodged in the Parliament Office; and subsequently, on the lodgment of the respondent's case, ten *bound* copies (*see directions in the appendix hereto as to binding printed cases*).

Where reference is made to a document printed in the appendix, the case must contain a marginal note of the page of the appendix containing such document.

There is no penalty on respondents who do not lodge their printed cases within the time limited by Standing Order No. 5, but respondents can only appear at the bar on a printed case.

As soon as the printed cases of all parties and the appendix thereto have been lodged, it is optional for either side to set down the cause for hearing, but it is *obligatory* on the appellant, upon the lodgment of his printed cases and the appendix, to set down the cause for hearing within the time limited by Standing Order No. 5 (*ex parte* as to those respondents who have not already lodged printed cases, upon proof, by affidavit, of the due service of the before-mentioned

"order of service" upon the respondents or their solicitors). A respondent who has lodged his printed cases, is at liberty to set down the cause for hearing on the first *sitting* day after the expiration of the time limited by the Standing Order for lodging printed cases.

The cause will then be ripe for hearing, and will take its position on the effective cause list.

ORDERS
UNDER THE
APPELLATE
JURISDIC-
TION ACT.

**Nov.
1876.**

STANDING ORDERS

APPLICABLE TO ALL APPEALS PRESENTED TO
THE HOUSE OF LORDS ON OR AFTER THE
1ST DAY OF NOVEMBER, 1876.

STANDING
ORDERS.

**Nov.
1876.**

STANDING ORDER I.

ORDERED, that, except where otherwise provided by statute, no petition of appeal be received by this House unless the same be lodged in the Parliament office for presentation to the House within one year from the date of the last decree, order, judgment, or interlocutor appealed from.

IN cases in which the person entitled to appeal be within the age of one and twenty years, or covert, non compos mentis, imprisoned, or out of Great Britain and Ireland, such person may be at liberty to present his appeal to the House, provided that the same be lodged in the Parliament office within one year next after full age, discoveriture, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland: But in no case shall any person or persons be allowed a longer time, on account of mere absence, to present an appeal, than five years from the date of the last decree, order, judgment, or interlocutor appealed against.

ORDER I.

Time limited
for presenting
appeals.

Applicable to
all decrees, &c.,
pronounced on
and after the
1st day of
November,
1876.

STANDING ORDER II.

ORDERED, that all petitions of appeal be signed, and the reasonableness thereof certified, by two counsel who shall have attended as counsel in the Court below, or shall purpose attending as counsel at the hearing in this House.

ORDER II.

Appeals to be
signed and
certified by
counsel.

STANDING
ORDERS ON
APPEALS TO
THE HOUSE
OF LORDS.

**Nov.
1876.**

ORDER III.

“Order of
service.”

STANDING ORDER III.

ORDERED, that the “order of service” issued upon the presentation of an appeal for service on the respondent or his solicitor, be returned to the Parliament Office, together with an affidavit of due service entered thereon, within the time limited for the appellant to lodge his printed cases, unless within that period all the respondents shall have lodged their printed cases; in default, the appeal to stand dismissed.

STANDING ORDER IV.

ORDER IV.
Recognizance.

ORDERED, in all appeals that the appellant or appellants do give security to the clerk of the Parliaments by recognizance to be entered into, in person or by substitute, to the Queen of the penalty of five hundred pounds, conditioned to pay to the respondent or respondents all such costs as may be ordered to be paid by the House in the matter of the appeal; and further, that the appellant or appellants do procure two sufficient sureties, to the satisfaction of the clerk of the Parliaments, to enter into a joint and several bond to the amount of two hundred pounds, or do pay in to the account of the Fee Fund of the House of Lords the sum of two hundred pounds; such bond, or such sum of two hundred pounds, to be subject to the order of the House with regard to the costs of the appeal: Ordered, that within one week after the presentation of the appeal the appellant or appellants do pay in to the account of the Fee Fund of the House of Lords the said sum of two hundred pounds, or submit to the clerk of the Parliaments the names of the sureties proposed to enter into the said bond; and, in the event of a substitute being proposed to enter into the said recognizance, the name of such substitute; two clear days previous notice of the names so proposed for bond and recognizance to be given to the solicitor or agent of the respondent: Ordered, that the said bond and the recognizance (whether entered into by the appellants or by a substitute) be returned to the Parliament office duly executed within one week from the date of the issue thereof to the solicitor or agent of the appellant or appellants. On default by the appellant or appellants in complying with the above conditions, the appeal to stand dismissed.

STANDING ORDER V.

STANDING
ORDERS ON
APPEALS TO
THE HOUSE
OF LORDS.**Nov.
1876.**

ORDER V.

1. ORDERED, that in English appeals, the printed cases and the appendix thereto be lodged in the Parliament office within six weeks from the date of the presentation of the appeal to the House; in Scotch and Irish appeals, within eight weeks; and the appeal set down for hearing on the first *sitting* day after the expiration of those respective periods (or as soon before, at the option of either party, as all the printed cases and the appendix shall have been lodged); on default by the appellant the appeal to stand dismissed.

Printed cases,
time limited
for lodging,
and for setting
down the cause
for hearing.

2. ORDERED, that in all appeals from Scotland the appellant alone, in his printed case or in the appendix thereto, shall lay before this House a printed copy of the record as authenticated by the lord ordinary; together with a supplement containing an account, without argument or statement of other facts, of the further steps which have been taken in the cause since the record was completed, and containing also copies of the interlocutors or parts of interlocutors complained of; and each party shall in their cases lay before the House a copy of the case presented by them respectively to the Court of Session, if any such case was presented there, with a short summary of any additional reasons upon which he means to insist; and if there shall have been no case presented to the Court of Session, then each party shall set forth in his case the reasons upon which he founds his argument, as shortly and succinctly as possible.

Scotch appeals.

3. ORDERED, that all printed cases be signed by one or more counsel, who shall have attended as counsel in the court below, or shall purpose attending as counsel at the hearing in this House.

Printed cases
to be signed
by counsel.

STANDING ORDER VI.

ORDERED, that all cross appeals be presented to the House within the period allowed by Standing Order No. V. for lodging cases in the original appeal.

ORDER VI.
Cross appeals.

STANDING
ORDERS ON
APPEALS TO
THE HOUSE
OF LORDS.

Nov.
1876.

ORDER VII.

Expiry of time
during recess.

STANDING ORDER VII.

ORDERED, with regard to appeals in which the periods severally dating from the presentation of the appeal under Standing Orders Nos. III., IV., V., and VI. expire during the recess of the House, that such periods be extended to the third sitting day of the next ensuing meeting of the House.

STANDING ORDER VIII.

ORDER VIII.

Supplemental
cases to be
delivered in
where appeals
are revived or
parties added.

ORDERED, that where any party or parties to an appeal shall die pending the same, subsequently to the printed cases having been lodged, and the appeal shall be revived against his or her representative or representatives as the person or persons standing in the place of the person or persons so dying as aforesaid, a supplemental case shall be lodged by the party or parties so reviving the same respectively, stating the order or orders respectively made by the House in such case.

The like rule shall be observed by the appellant and respondent respectively, where any person or persons, party or parties in the Court below, have been omitted to be made a party or parties in the appeal before this House, and shall, by leave of the House, upon petition or otherwise, be added as a party or parties to the said appeal after the printed cases in such appeal shall have been lodged.

STANDING ORDER IX.

ORDER IX.

Scotch appeals.
Certificate of
leave or differ-
ence of opinion
to be signed
by counsel on
appeals.

ORDERED, that when any petition of appeal shall be presented to this House from any interlocutory judgment of either division of the Lords of Session in Scotland, the counsel who shall sign the said petition, or two of the counsel for the party or parties in the Court below, shall sign a certificate or declaration, stating either that leave was given by that division of the judges pronouncing such interlocutory judgment to the appellant or appellants to present such petition of appeal, or that there was a difference of

opinion amongst the judges of the said division pronouncing such interlocutory judgment.

STANDING
ORDERS ON
APPEALS TO
THE HOUSE
OF LORDS.

Nov.
1876.

STANDING ORDER X.

ORDER X.
Taxation of
costs.

ORDERED, that in all cases in which this House shall make any order for payment of costs by any party or parties in any cause without specifying the amount, the clerk of the Parliaments or clerk assistant shall, upon the application of either party, appoint such person as he shall think fit to tax such costs, and the person so appointed may tax and ascertain the amount thereof, and shall report the same to the clerk of the Parliaments or clerk assistant: And it is further ordered, that the same fees shall be demanded from and paid by the party applying for such taxation for and in respect thereof as are now or shall be fixed by any resolution of this House concerning such fees; and the said person so appointed to tax such costs may, if he thinks fit, either add or deduct the whole or a part of such fees at the foot of his report: And the clerk of the Parliaments or clerk assistant may give a certificate of such costs, expressing the amount so reported to him as aforesaid; and the amount in money certified by him in such certificate shall be the sum to be demanded and paid under or by virtue of such order as aforesaid for payment of costs.

APPENDIX (A).

(CERTIFICATE OF SUFFICIENCY OF SURETIES, &c.)

Lodged in the Parliament Office on the _____ day of _____, 18____, APPENDIX A.

In the House of Lords.

"A. and others v. B. and others."

In compliance with Standing Order No. IV., I (we) submit the names of (full name) of (address) and (full name) of (address) { as fit and proper sureties } to enter into the { bond } thereby required: { or, as a fit and proper substitute } recognizance
and I (we) certify in { my } belief, that the said (full name) and the { our }

said (*full name*) $\left\{ \begin{array}{c} \text{are each} \\ \text{is} \end{array} \right\}$ worth upwards of $\left\{ \begin{array}{c} \text{£200} \\ \text{£500} \end{array} \right\}$ over and above
 $\left\{ \begin{array}{c} \text{their} \\ \text{his} \end{array} \right\}$ just debts.

This certificate may be signed by the country solicitor or agent of the appellants.

I (we) certify that a copy of the above certificate and two clear days notice of the intention to lodge the same in the Parliament Office has been served on the solicitors or agents of the respondents.

To be signed by the London solicitor or agent of the appellants.

(B.)

(DIRECTIONS FOR BINDING PRINTED CASES FOR THE USE OF THE
LAW LORDS.)

1. Ten copies bound in purple cloth; two of the ten to be interleaved, as regards the cases only.

2. Short title of cause on the back.
3. Label on side, stating short title of cause and contents of the volume, thus :—

"*A.* — and others *v.* *B.* — and others."

Printed copy of the appeal.

Appellants' case.

Respondent B.'s case.

Respondent's C.'s case.

Appendix.

4. The volume to be indented, and the names of the parties written on the indentations to their respective cases.
5. References to the reports of the cause in the Courts below, or the words "Not reported" to be written on the fly sheet.
6. The bound copies to be lodged immediately after the respondent's cases are delivered in.

The agents are requested to use their discretion as to the size of the volume, arrangement of the cases, and appendix. In dealing with bulky cases, it may be found advisable to bind the appendix as a separate volume, and also to divide the appellants' and respondents' cases into separate volumes.

It is the duty of the appellants' agent to carry out these directions.

STANDING
ORDERS ON
APPEALS TO
THE HOUSE
OF LORDS.

Nov.
1876.

APPENDIX C.

(C.)

(PETITION FOR EXTENSION OF TIME TO LODGE CASES, &c.)

(To be engrossed on foolscap paper, and (unless assent of respondent's agent be obtained) a copy, and two clear days notice of intention to present, to be given to respondent's agent.)

In the House of Lords.

(Insert Short Title of Cause.)

To the Right Honourable the Lords Spiritual and Temporal in
Parliament assembled.

The humble petition of the appellant

Sheweth,

That your petitioner presented petition of appeal on the
day of complaining of *(insert dates of orders or*
interlocutors complained of)

That the time allowed by Standing Order No. V. (*or*) extended by
your Lordship's order of the *(state date)*) for the appellant to lodge his
printed cases and the appendix, will expire on the *(state date)*.

That your petitioner *(set forth cause of delay)*.

Your petitioner therefore humbly prays that your Lordships
will be pleased to grant him *(set forth time required)*
further time to lodge his printed cases, and the appendix,
and set down the cause for hearing.

And your petitioner will ever pray.

Agents for the appellant.

We consent to the prayer of the above petition.

Agents for the respondents.

APPELLATE JURISDICTION ACT, 1876.

ECCLESIASTICAL CASES.

ORDER IN COUNCIL UNDER THE APPELLATE JURISDICTION ACT, 1876.

November 28, 1876.

ORDER IN
COUNCIL AS
TO ECCLE-
SIASTICAL
CASES.

**Nov. 28,
1876.**

WHEREAS there was this day read at the Board a representation, dated at the Council Chamber, Whitehall, on the 15th November instant, from the Right Honourable and Most Reverend the Archbishop of Canterbury, the Right Honourable and Most Reverend the Archbishop of York, the Right Honourable and Right Reverend the Bishop of London, the Right Honourable the Lord Chancellor, and the Right Honourable the Lords of the Judicial Committee of Her Majesty's Privy Council, humbly recommending to Her Majesty that the following be the Rules under the Appellate Jurisdiction Act, 1876, by which it is enacted that Her Majesty may, by Order in Council, with the advice of the Judicial Committee of Her Majesty's Privy Council, or any five of them, of whom the Lord Chancellor shall be one, and of the Archbishops and Bishops being members of Her Majesty's Privy Council, or any two of them, make rules for the attendance on the hearing of ecclesiastical cases as assessors of the said committee of such number of the archbishops and bishops of the Church of England as may be determined by such rules, and that the rules may provide for the assessors being appointed for one or more year or years, or by rotation, or otherwise, and for filling up any temporary or other vacancies in the office of assessor :

“I. The Archbishop of Canterbury, the Archbishop of York, and the Bishop of London shall be ex officio assessors of the Judicial Committee of Her Majesty's Privy Council on the hearing of ecclesi-

astical cases according to the following rota, that is to say, the Archbishop of Canterbury from this day until the 1st of January, 1878; the Archbishop of York from the 1st of January, 1878, till the 1st of January, 1879; and the Bishop of London from the 1st of January, 1879, until the 1st of January, 1880, and so on by a similar rotation for the period of one year each.

ORDER IN
COUNCIL AS
TO ECCLE-
SIASTICAL
CASES.

**Nov. 28,
1876.**

- "II. The other bishops of dioceses within the provinces of Canterbury and York shall attend as assessors of the Judicial Committee on the hearing of ecclesiastical cases according to the following rota, that is to say, from this day until the 1st of January, 1878, the four bishops who on this day are the four junior bishops for the time being; seniority for the purpose of this order to be reckoned from the date of appointment to the Episcopal See; from the 1st of January, 1878, till the 1st of January, 1879, the four bishops who on the 1st of January, 1878, shall be the four bishops next in order of seniority; and from the 1st of January, 1879, till the 1st of January, 1880, the four bishops who on the 1st of January, 1879, shall be the four bishops next in order of seniority, and so on by a similar rotation until the senior bishop for the time being is reached, when the rotation shall be carried back to and again commenced with the junior bishop.
- "III. In the event of any one, or more than one, vacancy occurring in the office of ecclesiastical assessor, the vacancy or vacancies shall be filled up by the person or persons then next according to the rotations aforesaid.
- "IV. A summons to attend on the hearing of every ecclesiastical case about to be heard before the said Judicial Committee shall be issued to the five ecclesiastical assessors for the time being; and no such case shall be heard before the said Judicial Committee unless there are at least three of such assessors present at the hearing: Provided that the assessors present at the commencement of the

ORDER IN
COUNCIL AS
TO ECCLE-
SIASTICAL
CASES.

**Nov. 28,
1876.**

hearing of any such case shall continue to be the assessors for that case until it shall be fully heard and disposed of, although their term of office, according to the rotation aforesaid, may in the meantime have expired: Provided also, that in the event of the death, resignation, or absence by reason of illness or other unavoidable cause, of any one of the assessors present at the commencement of the hearing, the hearing of the case may proceed so long as at least two assessors are present."

Her Majesty, having taken the said representation into consideration, was pleased, by and with the advice of Her Privy Council, to approve the said rules made upon the recommendation of the Right Honourable the Most Reverend and Right Reverend Prelates, the Right Honourable Lord Chancellor, and the Right Honourable the Lords of the Judicial Committee as aforesaid, and to order, as it is hereby ordered, that the same be punctually observed, obeyed, and carried into execution. Whereof the Most Reverend and Right Reverend the archbishops and bishops of dioceses, within the provinces of Canterbury and York, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

C. L. PEEL.

RULES OF THE SUPREME COURT,

December, 1876.

I, the Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, do hereby, in pursuance of the seventeenth section of "The Appellate Jurisdiction Act, 1876," appoint Sir William Baliol Brett, Mr. Justice Lush, Mr. Baron Pollock, and Mr. Justice Manisty to be the four judges of the Supreme Court of Judicature, by whom, together with the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, rules of Court for carrying into effect the enactments contained in the said section of the said Act shall be made as therein mentioned. And this appointment is to continue in force until the first day of January, 1878.

CAIRNS,
C.

November 7th, 1876.

1. These rules may be cited as "The Rules of the Supreme Court, December, 1876," or each separate rule may be cited as if it had been one of the rules of the Supreme Court, and had been numbered by the number of the order and rule mentioned in the margin.

RULES OF
THE
SUPREME
COURT.

Dec. 1876.

2. These rules shall come into operation on the 1st December, 1876.

ORDER XXXVI.

TRIAL.

3. Order XXXVI., Rule 22, is hereby repealed, and instead thereof the following rule shall take effect:—

Upon the trial of an action the Judge may, at or after the trial, direct that judgment be entered for any or either party,

[ORDER
XXXVI.]

Rule 22a.
Ante, p. 375.

RULES OF
THE
SUPREME
COURT.

Dec. 1876.

[ORDER
XXXVI.]

Rule 29a.
Ante, p. 378.

or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge.

4. Where in any action in the Chancery Division the action or any question at issue in the action is ordered to be tried before any commissioner or commissioners of assize, or at the London or Middlesex sittings of any division other than the Chancery Division, the order directing such trial shall state on its face the reason for which it is expedient that the action, question, or issue should be so tried and should not be tried in the Chancery Division.

ORDER XXXIX.

NEW TRIAL.

[ORDER
XXXIX.]

Rule 1.
Ante, p. 386.

5. Order XXXIX., rule 1, is hereby repealed, and instead thereof the following provision shall take effect:—

Rule 1. Where, in an action in the Queen's Bench, Common Pleas, or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. And where the trial has been by a Judge without a jury, the application for a new trial shall be to the Court of Appeal.

[ORDER
XXXIX.]

Rule 1a.
Ante, p. 387.

6. Applications for new trials shall be by motion calling on the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the Court or a Judge shall enlarge the time:—

An application to a Divisional Court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial, or on the first subsequent day on which a Divisional Court to which the application may be made shall have actually sat to hear motions. If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within the first four days of the next following sittings.

ORDER XL.

MOTION FOR JUDGMENT.

RULES OF
THE
SUPREME
COURT.Dec. 1876.

7. Order XL., rules 4 and 6 are repealed, and rule 5 is repealed so far as it affects trials before a Judge; and the following rule shall be substituted for rule 4 :—

[ORDER XL.]
Rules 4, 5, 6.

4. Where, at or after the trial of an action by a jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them.

ORDER XL.]
Rule 4.
Ante, p. 391.

Where, at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong.

An application under this rule shall be to the Court of Appeal.

ORDER LVIIA.

DIVISIONAL AND OTHER COURTS.

8. The following proceedings and matters shall continue to be heard and determined before the Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein heretofore taken before a single Judge to be taken before a Divisional Court :—

[ORDER
LVIIA.]
Rule 1.
Ante, pp. 454,
455.

Proceedings on the Crown side of the Queen's Bench Division.

Appeals from revising barristers, and proceedings relating to election petitions, parliamentary and municipal.

Appeals under Section 6 of the County Courts Act, 1875.

RULES OF
THE
SUPREME
COURT.
Dec. 1876.

Proceedings on the revenue side of the Exchequer Division.

Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final.

Cases stated by the railway commissioners under the 36 & 37 Vict., c. 48.

Cases of habeas corpus, in which a Judge directs that a rule nisi for the writ, or the writ be made returnable before a Divisional Court.

Special cases where all parties agree that the same be heard before a Divisional Court.

Appeals from chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions, and applications for new trials in the said division where the action has been tried with a jury.

[ORDER
LVIIA.]
Rule 2.
Ante, p. 455.

9. Where, by Sect. 17 of the Appellate Jurisdiction Act, 1876, or by these rules, any application ought to be made to, or any jurisdiction exercised by the Judge before whom an action has been tried, if such Judge shall die or cease to be a Judge of the High Court, or if such Judge shall be a Judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such Judge should act in the matter, the president of the division to which the action belongs may either by a special order in any action or matter, or by a general order applicable to any class of actions or matters, nominate some other Judge to whom such application may be made, and by whom such jurisdiction may be exercised.

[ORDER
LVIIA.]
Rule 3.
Ante, p. 455.

10. Every vacation Judge shall have the same power and authority as heretofore.

ORDER LVIII.

APPEALS FROM INFERIOR COURTS.

[ORDER
LVIII.]
Rule 19.
Ante, p. 472.

11. Rule 16 of the Rules of the Supreme Court, December 1875, is hereby repealed, and instead thereof the following provision shall take effect:—

Every Judge of the High Court of Justice for the time being shall be a Judge to hear and determine appeals from

inferior Courts, under Section 45 of the Supreme Court of Judicature Act, 1873. All such appeals (except Admiralty appeals from inferior Courts, which until further order shall be assigned as heretofore to the present Judge of the Admiralty Court,) shall be entered in one list by the officers of the Crown Office of the Queen's Bench Division; and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division, as the presidents of those divisions shall from time to time direct.

Nothing in this order shall affect the validity of any rule or regulation heretofore issued with reference to such appeals by the Divisional Court formed under the said section.

CAIRNS, C.
A. E. COCKBURN.
G. JESSEL.
COLERIDGE.
FITZROY KELLY.
WM. BALIOL BRETT.
ROBT. LUSH.
C. E. POLLOCK.
H. MANISTY.

RULES OF
THE
SUPREME
COURT.

Dec. 1876.

ORDER OF COURT.

It is ordered that the party entering a special case under Order LVIII., rule 19, at the Crown Office of the Queen's Bench Division shall, four clear days before the day appointed for argument, deliver two copies of the case to the Judges of the Divisional Court to which such cause has been assigned for argument at the Judges' chambers in Rolls Gardens, Chancery Lane, such copies to be marked "for the use of the Judges in the Queen's Bench (Common Pleas or Exchequer) Division," and not with the name of any particular Judge, and to be divided into paragraphs, and numbered as in the special case. Such copies are to be forthwith forwarded to the proper divisions at Westminster. Order of Court. See Weekly Notes, February 3rd, 1877, p. 58.

ORDER OF
COURT.

Ante, p. 472.

DIVORCE AND MATRIMONIAL CAUSES.

ADDITIONAL RULES AND REGULATIONS.

17th April, 1877.

ADDITIONAL
RULES
AND REGU-
LATIONS AS
TO DIVORCE
AND MATRI-
MONIAL
CAUSES.

April 17,
1877.

WHEREAS by an Act passed in the session of parliament holden in the twentieth and twenty-first years of the reign of Her present Majesty, chapter 85, it is provided that there shall be a Court of Record to be called "The Court for Divorce and Matrimonial Causes:" and whereas by section 53 of the said Act it is further provided that the said Court shall make such Rules and Regulations concerning the practice and procedure under the said Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same: and whereas by another Act passed in the session of parliament holden in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter 144, it is enacted that it shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to exercise all powers and authority whatever thentofore exercised by the full Court: and whereas by another Act passed in the thirty-eighth and thirty-ninth years of Her Majesty's reign, chapter 77, it is enacted that the President for the time being of the Probate and Divorce Division of the High Court of Justice, shall have the powers as to the making of Rules and Regulations conferred by the 53rd section of the 20th and 21st Victoria, chapter 85:

Now I, the Right Honourable Sir James Hannen, Knight, President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, do make the following amended and additional rules and regulations concerning the practice and procedure in Divorce and Matrimonial Causes, to take effect on and after the 1st day of May, 1877.

(Signed) JAMES HANNEN.

Dated the 17th April, 1877.

ADDITIONAL RULES AND REGULATIONS.

SHEWING CAUSE AGAINST A DECREE NISI.

202. When the Queen's Proctor desires to show cause against making absolute a Decree Nisi for dissolution or nullity of marriage, he shall enter an appearance in the cause in which such Decree Nisi has been pronounced, and shall within fourteen days after entering appearance file his plea in the registry, setting forth the grounds upon which he desires to shew cause as aforesaid, and on the day he files his plea in the registry, shall deliver a copy thereof to the person in whose favour such decree has been pronounced, or to his or her solicitor, and all subsequent pleadings and proceedings in respect to such plea shall be filed and carried on in the same manner as directed by the existing Rules and Regulations No. 68 and 69, in regard to the plea of the Queen's Proctor, filed after obtaining leave to intervene in a cause, and the existing Rules and Regulations from No. 70 to No. 76, both inclusive, shall no longer be applicable to the Queen's Proctor on his shewing cause as aforesaid, save so far as regards any proceedings already commenced in pursuance of the said Rules and Regulations.

ADDITIONAL
RULES
AND REGU-
LATIONS AS
TO DIVORCE
AND MATRI-
MONIAL
CAUSES.

April 17,
1877.

WRITS OF FIERI FACIAS AND OTHER WRITS.

203. In default of payment of any sum of money at the time appointed by any order of the Court for the payment thereof, a Writ of Fieri Facias or Writ of Sequestration or Writ of Elegit shall be issued as of course in the registry upon an affidavit of service of the order and nonpayment.

MAINTENANCE AND SETTLEMENTS.

204. The registrar to whom pleadings are referred for investigation under Rule 101, shall, if he thinks fit, be at liberty to require the attendance of the husband or wife for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses in the same manner as on a reference for an allotment of alimony.

THE
SUPREME COURT OF JUDICATURE
ACTS, 1873 AND 1875.

ORDER AS TO THE FEES TO BE TAKEN BY THE
OFFICIAL REFEREES.

ORDER AS
TO FEES OF
OFFICIAL
REFEREES.

**April 24,
1877.**

The Right Honourable HUGH MACCARMONT BARON CAIRNS, Lord High Chancellor of Great Britain, with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasurer, doth hereby, in exercise of the powers for this purpose given by the Supreme Court of Judicature Act, 1875, and of all other powers and authorities enabling him in this behalf, rescind, as to all matters, questions, or issues which shall be referred to an official referee from and after the date hereof, the order as to the fees to be taken by the official referees made on the 1st day of February, 1876, and doth order and direct as follows:—

From and after the date hereof, the fee to be taken by an official referee attached to the Supreme Court, in respect of all matters, questions, or issues referred to him by any order, shall be the sum of 5*l.* for the entire reference, irrespective of the time occupied, which sum shall be paid before the reference is proceeded with.

Every such fee shall be collected by means of a stamp or stamps to be affixed to the appointment paper or summons issued by the official referee for appointing the time and place for proceeding with the reference.

Where the sittings under a reference are to be held elsewhere than in London, a convenient place in which the sittings may be held shall be provided to the satisfaction of the official referee, by and at the expense of the party pro-

ceeding with the reference ; and there shall be paid, in addition to the above fee of 5*l.*, 1*l.* 11*s.* 6*d.* for every night the official referee, and 15*s.* for every night the official referee's clerk is absent from London on the business of the reference, together with the reasonable expenses of their travelling from London and back.

ORDER AS
TO FEES OF
OFFICIAL
REFEREES.

**April 24,
1877.**

A deposit on account of expenses may be required before proceeding with the reference, or at any time during the course thereof ; and a memorandum of the amount deposited shall be delivered to the party making the deposit.

The fees and expenses and deposit (if any) hereby authorized in respect of any reference shall be paid in the first instance by the party proceeding with the reference.

The official referees shall conform to all regulations that may be made from time to time by the Treasury for the accounting for all moneys received by them.

Dated this twenty-fourth day of April, one thousand eight hundred and seventy-seven.

CAIRNS, C.

JNO. MELLOR.

ROBT. LUSH.

HENRY MANISTY.

We certify that this order is made with the concurrence of the Commissioners of Her Majesty's Treasury.

J. D. H. ELPHINSTONE.

ROW. WINN.

RULES OF THE SUPREME COURT.

May, 1877.

RULES OF
THE
SUPREME
COURT.

May,
1877.

1. These rules may be cited as "The Rules of the Supreme Court, May, 1877," or each separate rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the order and rule mentioned in the margin.

2. These rules shall come into operation on the 1st June, 1877.

ORDER XIV.

Leave to Defend where Writ specially Indorsed.

[ORDER XIV.]

Rule 1.
Ante, p. 216.

3. Order XIV., Rule 1, of the Rules of the Supreme Court is hereby repealed, and the following rule is substituted:—

Where the defendant appears to a writ of summons specially indorsed under Order III., Rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to sign judgment accordingly.

CAIRNS, C.
A. E. COCKBURN.
G. JESSEL.
COLERIDGE.
FITZROY KELLY.
WM. BALIOL BRETT.
ROBT. LUSH.
C. E. POLLOCK.
H. MANISTY.

May, 1877.

RULES OF THE SUPREME COURT.

June, 1877.

1. These Rules may be cited as "The Rules of the Supreme Court, June, 1877," or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the order and rule mentioned in the margin.

RULES OF
THE
SUPREME
COURT.
**June,
1877.**

2. These Rules shall come into operation on the 19th June, 1877.

ORDER V.

Subject to the power of transfer, and subject also to the power of the Lord Chancellor by order from time to time otherwise to direct, every cause or matter which shall be commenced in the Chancery Division of the High Court shall be assigned to one of the Judges thereof by marking the same with the name of such of the same Judges as the plaintiff or petitioner may in his option think fit.

[ORDER V.]
Rule 4a.
Ante, p. 176.

ORDER LI.

In the Chancery Division a transfer of a cause from one Judge to another may by the same or a separate order be ordered to be made or to be deemed to have been made for the purpose only of trial or of hearing, and in such case the original and any further hearing shall take place before the Judge to whom the cause shall be so transferred; but all other proceedings therein, whether before or after the hearing or trial of the cause, shall be taken and prosecuted in the same manner as if such cause had not been transferred from the Judge to whom it was assigned at the time of transfer, and as if such Judge had made the decree or judgment, if any, made therein, unless the Judge to whom the cause is transferred shall direct that any further proceed-

[ORDER LI.]
Rule 1a.
Ante, pp. 431,
432.

RULES OF
THE
SUPREME
COURT.

June,
1877.

ings therein, before or after the hearing or trial thereof, shall be taken and prosecuted before himself or before an official or special referee.

CAIRNS, C.
A. E. COCKBURN.
G. JESSEL.
ROBT. LUSH.

ORDER OF THE LORD CHANCELLOR.

ORDER OF
THE LORD
CHAN-
CELLOR.

I, the Right Honourable HUGH MACCALMONT BARON CAIRNS, Lord High Chancellor of Great Britain, do hereby order and direct as follows:—

1. Each of the several causes which have been or shall be transferred to Mr. Justice Fry shall, until further order, be deemed to have been transferred to him for the purpose only of trial or of hearing.

2. No cause or matter shall, until further order, be assigned to the said Mr. Justice Fry by the same being marked by the plaintiff or petitioner with the name of the said Mr. Justice Fry.

Dated this 19th day of June, 1877.

CAIRNS, C.

ORDER

AS TO THE

FEES AND PERCENTAGES

IN THE DISTRICT REGISTRIES AT LIVERPOOL AND
MANCHESTER.

Wednesday, Oct. 24, 1877.

THE HIGH COURT OF JUSTICE.

Order by the Lord Chancellor and Judges, with the consent of the Treasury, directing the Fees in the District Registries at Liverpool and Manchester (with certain exceptions) to be taken by Stamps.

ORDER AS
TO FEES
AND PER-
CENTAGES.

**Oct. 24,
1877.**

Whereas by an Order dated the 28th day of October, 1875, made by the Lord Chancellor in pursuance and exercise of the powers given by the 26th section of "The Supreme Court of Judicature Act, 1875," it was ordered that the fees and per-centages contained in the schedule to the same Order should be taken by stamps, except those taken in the District Registries, which should until further order be taken in money and applied and accounted for as the Treasury might from time to time appoint: And whereas it is expedient to abolish the said exception so far as relates to the said fees and per-centages taken in the District Registries at Liverpool and Manchester respectively, and also to direct that certain fees and per-centages hereinafter mentioned should be taken in the same District Registries in money and not by stamps: Now, therefore, the Right Honourable Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, by and with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, doth hereby in pursuance and exercise of the powers given by the above-

Ante, p. 583.

ORDER AS
TO FEES
AND PER-
CENTAGES.

Oct. 24,
1877.

mentioned Act, and all other powers and authorities enabling him in this behalf, order as follows :—

1. Notwithstanding the hereinbefore recited Order or anything therein contained, all the fees and per-centages contained in the schedule to that Order which are taken in the District Registries at Liverpool and Manchester respectively of the High Court of Justice, shall be taken in stamps.

2. All fees and per-centages taken in the said District Registries at Liverpool and Manchester respectively, which are chargeable upon and paid out of the proceeds of the sale of property sold pursuant to any Order of the Admiralty Division of the High Court of Justice, shall until further order be taken in money, and be applied and accounted for as the Treasury may from time to time direct.

3. This Order shall come into operation on the 2nd day of November, 1877.

CAIRNS, C.

G. JESSEL, M.R.

HENRY C. LOPES.

EDW. FRY.

We certify that this Order is made with the concurrence of the Lords Commissioners of Her Majesty's Treasury.

CRICHTON.

ROW. WINN.

TIME TABLE.

ACCOUNT	Application for account may be made <i>at any time</i> after time for entering an appearance has expired, O. XV., r. 2 (<i>ante</i> , p. 222).
AFFIDAVITS by plaintiff . .	Affidavits must be filed by plaintiff <i>within 14 days</i> (in the absence of special agreement or order) after a consent to take evidence by such, O. XXXVIII., r. 1 (<i>ante</i> , p. 384).
by defendant	Defendant <i>within 14 days</i> after delivery of plaintiff's list (save as above) must file his affidavit and deliver list to plaintiff, O. XXXVIII., r. 2 (<i>ante</i> , p. 384).
by plaintiff in reply . . .	Plaintiff must file his affidavits in reply <i>within 7 days</i> (save as above), O. XXXVIII., r. 3 (<i>ante</i> , p. 384).
AMENDMENT of statement of claim	Statement of claim may be amended without leave once <i>before expiration of time limited for reply</i> , or if no defence be delivered, <i>within 4 weeks</i> from last appearance, O. XXVII., r. 2 (<i>ante</i> , p. 286).
copy of amendment	Copy of amended statement must be delivered to a new defendant <i>at the time when he is served with writ of summons or notice</i> , or afterwards <i>within 4 days</i> after his appearance, O. XVI., r. 16 (<i>ante</i> , p. 244).
of set-off or counter-claim .	Where set-off or counter-claim is pleaded, amendment may be made without leave <i>any time before expiration of time for pleading to reply</i> , or if no reply, then <i>before expiration of 28 days</i> from filing defence, O. XXVII., r. 3 (<i>ante</i> , p. 286).
application to disallow . .	After amendment under above rules, the opposite party may <i>within 8 days</i> from delivery of amended pleading apply to have such disallowed, either entirely or in part, O. XXVII., r. 4 (<i>ante</i> , p. 287).
when leave becomes void .	If leave to amend has been obtained and advantage has not been taken of such within time allowed, or <i>within 14 days</i> from leave, such leave becomes void, O. XXVII., r. 7 (<i>ante</i> , p. 287).
of writ of summons	Writ of summons may be amended by leave <i>at any time</i> , O. XXVII., r. 11 (<i>ante</i> , p. 288).
APPEAL from District Registrar	Appeal from District Registrar to Judge (even where jurisdiction of Registrar only by consent) must be made, unless by leave, <i>within 4 days</i> after the decision complained against, O. XXXV., r. 7 (<i>ante</i> , p. 358).

APPEAL from District Registrar—*continued.*

- from Master Appeal to Judge from Master's decision must be made *within 4 days* from date of order complained of, or *within further time allowed*, O. LIV., r. 4 (*ante*, p. 447).
- from Chambers Appeal to Queen's Bench, Common Pleas, and Exchequer Divisions from Chambers must be made *within 8 days* from date of order complained of, O. LIV., r. 6 (*ante*, p. 447).
- from interlocutory orders . . . Appeals from interlocutory orders must be brought *within 21 days* from date of order, except by leave, O. LVIII., r. 15 (*ante*, p. 465).
Other appeals to Court of Appeal must be made *before expiration of 1 year*, O. LVIII., r. 15 (*ante*, p. 465).
- from winding-up order . . . Appeal from order of winding-up, or in bankruptcy or in any matter other than an action, must be made *within 21 days* from date of order, except by leave, O. LVIII., r. 9 (*ante*, p. 462).
- from *ex parte* application . . . Appeal *ex parte* from *ex parte* application to Court must be made *within 4 days* from date of refusal or *further allowed time*, O. LVIII., r. 10 (*ante*, p. 463).
- notice of Appeal from Judgment Notice of appeal from any judgment must be a *14 days'* notice, O. LVIII., r. 4 (*ante*, p. 458).
- from interlocutory order . . . Notice of appeal from interlocutory order must be a *4 days'* notice, O. LVIII., r. 4 (*ante*, p. 458).
- notice by respondent in appeal from final judgment . . . Notice by a respondent of intention to contend that the decision of the Court should be varied must be, subject to special order, an *8 days'* notice in the case of an appeal from final judgment, O. LVIII., r. 7 (*ante*, p. 462).
- from interlocutory order . . . In an appeal, as above, from interlocutory order, a *2 days'* notice, O. LVIII., r. 7 (*ante*, p. 462).

APPEAL TO HOUSE OF LORDS

- Appeals to House of Lords must be made *within 1 year* from date of last decree, order, judgment, or interlocutor appealed from. Lords Standing O. I., Nov. 1st, 1876 (*ante*, p. 629).
- in case of disability In case of disability, *within 1 year* after the removal of the same, O. I. (*ante*, p. 629).
- in case of absence In case of absence, not longer than *5 years* from date of last decree, &c., O. I. (*ante*, p. 629).
- order of service The "order of service" issued upon presentation of appeal for service on respondent must be returned to Parliament office in English appeals *within 6 weeks*, and in Scotch and Irish appeals *within 8 weeks*, from date of presentation of appeal to the House, unless within those periods all the respondents have lodged their cases, O. III. (*ante*, p. 630).
- security for costs. After presentation of appeal, appellants *within 1 week* to pay £200 to the fee fund of the House of Lords, or submit names of sureties, O. IV. (*ante*, p. 630).
- names of sureties Names of sureties to be given *2 clear days* before execution of bond, O. IV. (*ante*, p. 630).

APPEAL TO HOUSE OF LORDS—*continued.*

bond or recognizance . . . Bond or recognizance to be returned to Parliament office *within 1 week* from date of issue, O. IV. (*ante*, p. 630).

lodging of cases in English appeals In English appeals printed cases must be lodged in Parliament office *within 6 weeks* from date of presentation of appeal to House, O. VI. (*ante*, p. 631).

in Scotch and Irish In Scotch and Irish appeals *within 8 weeks*, O. VI. (*ante*, p. 631).

setting down for hearing . . . Appeal to be set down for hearing not later than the *1st sitting day* of the House after expiration of above periods, O. VI. (*ante*, p. 631).

expiration of time during recess Where time dating from presentation of appeal expires during the recess, it is to be extended to *3rd sitting day* of the next ensuing meeting of the House, O. VII. (*ante*, p. 632).

APPEARANCE within jurisdiction

Appearance must be entered by the defendant if within jurisdiction *within 8 days* of the service of the writ. Appendix A., Part I., Form 1 (*ante*, p. 479).

when beyond jurisdiction . . . If not within jurisdiction, appearance must be entered *within the time limited* in the order, giving leave to serve writ out of jurisdiction, O. XI., r. 4 (*ante*, p. 195).

when third person served with notice Where a person not a party is served under O. XVI., r. 18, with notice and wishes to dispute plaintiff's claim, he must enter appearance (except by leave) *within 8 days* from service of notice, O. XVI., r. 20 (*ante*, p. 249).

elsewhere than where writ issued A defendant who appears elsewhere than where writ is issued, must *on same day* give notice of appearance, O. XII., r. 6a (Feb., 1876) (*ante*, p. 197).

default of appearance . . . In default of appearance where claim is for liquidated demand but writ not specially indorsed, a plaintiff may, in certain cases, on filing affidavit of service and statement of particulars, *after expiration of 8 days*, enter final judgment, O. XIII., r. 5 (*ante*, p. 212).

BILL of Exchange Leave to defend an action under the Bills of Exchange Act may be granted if applied for *within 12 days* from service of writ, 18 & 19 Vict. c. 67, s. 2, incorporated into O. 2, r. 6 (*ante*, p. 164).

CHAMBERS, Appeal from Master's decision to judge

Appeal to judge from master's decision must be made *within 4 days* from date of order complained of, or *within further time allowed*, O. LIV., r. 4 (*ante*, p. 447).

from Chambers to Queen's Bench, &c., Divisions

Appeal to Queen's Bench, Common Pleas and Exchequer Divisions must be made *within 8 days* from date of order complained against, O. LIV., r. 6 (*ante*, p. 447).

- CHANGE of parties Where an order is made under O. L., r. 4, application to discharge or vary same must be made *within 12 days* from service thereof, O. L., r. 6 (*ante*, p. 430).
Any one being under disability, and not represented, may apply to discharge or vary order *within 12 days* after appointment of guardian *ad litem*, O. L., r. 7 (*ante*, p. 430).
- CLAIM, statement of.
Time for delivery Statement of claim may be delivered any time *within 6 weeks* from appearance, O. XXI., r. 1 (*ante*, p. 272).
in probate actions In probate actions it must, unless otherwise ordered, be delivered *before expiration of 6 weeks* from entry of appearance, or from time limited for appearance, in case of default, O. XXI., r. 2 (*ante*, p. 473).
But where defendant appears, plaintiff is not compelled to deliver statement *until the expiration of 8 days* after defendant has filed his affidavits as to scripts, O. XXI., r. 2 (*ante*, p. 473).
in Admiralty actions *in rem* In Admiralty actions *in rem*, statement must be delivered *within 12 days* from the appearance, O. XXI., r. 3 (*ante*, p. 273).
amendment generally Statement of claim may be amended without leave once *before expiration of time limited for reply*, or where no defence delivered *within 4 weeks* from last appearance, O. XXVII., r. 2 (*ante*, p. 286).
copy of amendment Copy of amended statement must be delivered to a new defendant at the time *when he is served* with writ of summons or notice, or afterwards *within 4 days* after his appearance, O. XVI., r. 16 (*ante*, p. 244).
- COSTS
payment into Court Where payment into Court is accepted in full satisfaction of claim, costs *to be paid within 48 hours* after taxation, O. XXX., r. 4 (*ante*, p. 304).
- CROSS-EXAMINATION, notice
for, after evidence taken
by affidavit Notice for cross-examination must be served *within 14 days* after time for filing affidavits in reply, or within such time as appointed, O. XXXVIII., r. 4 (*ante*, p. 385).
- DEFENCE, statement of, time
for delivery Statement of defence must be delivered *within 8 days* from delivery of statement of claim, or from time limited for appearance, O. XXII., r. 1 (*ante*, p. 274).
where no statement of claim
required Where no statement of claim is required, statement of defence may be delivered any time *within 8 days* after appearance, O. XXII., r. 2 (*ante*, p. 274).
where leave to defend Where defendant has leave to defend, he must deliver defence within time ordered, or *within 8 days* after the order, O. XXII., r. 3 (*ante*, p. 275).
defence or reply arising
pending action Further defence or reply arising pending action may be delivered by leave *within 8 days* after its arising, O. XX., r. 2 (*ante*, p. 271).

DEFENCE—*continued.*

- amendment Where set-off or counter-claim is pleaded, amendment thereof may be made without leave any time before expiration of time for pleading to reply, or if no reply, then *before the expiration of 28 days* from filing defence, O. XXVII., r. 3 (*ante*, p. 286).
- limited In an action for recovery of land, defence may be limited to a part, by serving notice to that effect *within 4 days* after appearance, O. XII., r. 21 (*ante*, p. 201).
- DEMURRER, time for delivery . Demurrer to a pleading must be delivered *within the same time as any other pleading* in the action, O. XXVIII., r. 3 (*ante*, p. 292).
- entry for argument If a demurrer be not entered for argument, and notice given thereof *within 10 days* after delivery, and no order for leave to amend be served, the demurrer is held good, O. XXVIII., r. 6 (*ante*, p. 293).
- DISCOVERY, time for Either party before close of pleadings may *once*, without order, or *at any time, by leave*, deliver interrogatories, O. XXXI., r. 1 (*ante*, p. 337).
- application to strike out . . Party interrogated may, *within 4 days* after service, apply to strike out any interrogatory as scandalous, irrelevant, or not *bonâ fide*, O. XXXI., r. 5 (*ante*, p. 339).
- answer Answer by affidavit to be filed *within 10 days*, or other time allowed, O. XXXI., r. 6 (*ante*, p. 342).
- DISMISSAL for want of prosecution. Instead of giving notice of trial under O. XXXVI., r. 3 A defendant, instead of giving notice of trial under O. XXXVI., r. 3, may apply to have action dismissed for want of prosecution, O. XXXVI., r. 4a (June, 1876) (*ante*, p. 366).
- default of delivery of statement of claim Where plaintiff is bound to deliver statement of claim, and does not do so in time, the defendant may apply, at *the expiration of 6 weeks from appearance or other allowed time*, to dismiss with costs for want of prosecution, O. XXIX., r. 1 (*ante*, p. 295).
- default of answering interrogatories, &c. If party does not answer interrogatories, or give inspection *within time limited* in the order, the action may be dismissed, or the defence struck out, and defendant placed in same position as if he had not pleaded, O. XXXI., r. 20 (*ante*, p. 349).
- ENTRY of cause in London or Middlesex A cause must be entered by one or the other party *within 6 days* after notice of trial, O. XXXVI., r. 10a (Dec. 1875) (*ante*, p. 371).
- Where party gives notice of trial for London or Middlesex and omits to enter action for trial, he who receives notice of trial may, in the absence of countermand, *within 4 days* himself enter the action for trial, O. XXXVI., r. 14 (*ante*, p. 372).
- of judgment, date of Entry of judgment, when pronounced in Court, shall be dated as of the *day on which judgment is given*, O. XLI., r. 2 (*ante*, p. 396).
- Otherwise entry as of day on which requisite documents are left with officer, O. XLI., r. 3 (*ante*, p. 396).

EXECUTION, writs of, when entitled to	Where money or costs payable under judgment, party generally entitled to sue out writs of <i>fiere facias</i> or <i>elegit</i> immediately after entry, O. XLII., r. 15 (<i>ante</i> , p. 401).
payment within certain period	If judgment be for payment within period mentioned, no writ until period expired, O. XLII., r. 15 (<i>ante</i> , p. 401).
when by leave	Leave may be given to issue execution before, or stay execution until any time after period mentioned, O. XLII., r. 15 (<i>ante</i> , p. 401).
duration of writs	If unexecuted, writs to remain in force for 1 year from issue, unless renewed, O. XLII., r. 16 (<i>ante</i> , p. 401).
until when may be issued .	As between the original parties to a judgment execution may issue <i>within 6 years</i> from recovery of judgment, O. XLII., r. 18 (<i>ante</i> , p. 402).
after six years	After 6 years or change in parties leave must be obtained, O. XLII., r. 19 (<i>ante</i> , p. 403).
FINAL JUDGMENT, default of appearance	In default of appearance where claim is liquidated but writ not specially indorsed, a plaintiff may, on filing affidavit of service and statement of particulars <i>after expiration of 8 days</i> enter final judgment, O. XIII., r. 5 (<i>ante</i> , p. 211).
judgment under O. XIV., r. 1.	Application for leave to enter final judgment under O. XIV., r. 1, must be made by summons returnable <i>not less than 2 clear days</i> after service, O. XIV., r. 2 (<i>ante</i> , p. 219).
appeal from	In an appeal from final judgment notice by a respondent of intention to contend that the decision of the Court should be varied must, subject to special order, be an <i>8 days'</i> notice, O. LVIII., r. 7 (<i>ante</i> , p. 462).
GUARDIAN	Notice of application for a guardian <i>ad litem</i> to be appointed to a defendant who has not appeared, must be served <i>6 clear days</i> before day named in such notice for hearing application, O. XIII. r. 1 (<i>ante</i> , p. 205). Person served with order under O. L., r. 3, may apply to have same discharged or varied <i>within 12 days</i> from service, O. L., r. 6 (<i>ante</i> , p. 430). Where person being under a disability and not having had a guardian <i>ad litem</i> appointed in the action is served with an order under O. L., r. 3, he may apply to have order discharged or varied <i>within 12 days</i> after appointment of such guardian, O. L., r. 7 (<i>ante</i> , p. 430).
INSPECTION. Notice to inspect	Inspection of documents referred to in the pleadings or affidavits can be applied for by notice <i>at any time before or at hearing</i> , O. XXXI., r. 14 (<i>ante</i> , p. 347).
notice that documents can be inspected	Party receiving such notice shall, <i>within 2 days</i> , if all documents referred to therein have been set out in pleadings or affidavits, or if not, <i>within 4 days</i> , give notice that <i>within 3 days</i> from delivery thereof, the documents can be inspected by opposite party, O. XXXI., r. 16 (<i>ante</i> , p. 348).

INTERPLEADER	Defendant may apply <i>at any time</i> after being served with writ and before delivery of defence, O. L., r. 2 (<i>ante</i> , p. 151).
INTERROGATORIES, time for delivering	Either party before close of pleadings may <i>once</i> without leave, or at any time by leave, deliver interrogatories, O. XXXI., r. 1 (<i>ante</i> , p. 337).
application to strike out	Party interrogated may, <i>within 4 days</i> after service, apply to strike out any interrogatory as scandalous, &c., O. XXXI., r. 5 (<i>ante</i> , p. 339).
answer	Answer by affidavit to be filed <i>within 10 days</i> , O. XXXI., r. 6 (<i>ante</i> , p. 342).
JUDGMENT for costs where payment into Court accepted in full satisfaction	Plaintiff may sign judgment for costs 48 hours after taxation where he accepts payment into Court in full satisfaction and has sent notice to that effect to the defendant, O. XXX., r. 4 (<i>ante</i> , p. 304).
where one party does not appear at trial, may be set aside	Judgment obtained where one party does not appear at the trial may be set aside on terms; application must be made <i>within 6 days</i> after trial, O. XXXVI., r. 20 (<i>ante</i> , p. 375).
where leave reserved time for setting down action on motion for judgment	Where leave to move has been reserved action must be set down on motion for judgment, and notice thereof must be given (unless otherwise ordered) <i>within 10 days</i> after trial, O. XL., r. 2 (<i>ante</i> , p. 390).
where no direction for entry of judgment	Where no direction for entry of judgment plaintiff must set down action on motion for judgment and give notice thereof <i>within 10 days</i> after trial, otherwise defendant may do so, O. XL., r. 3 (<i>ante</i> , p. 391).
where issues of fact ordered to be determined	Where issues of fact have been ordered to be determined, plaintiff may set down action on for judgment as soon as issues determined, if he fail to do so for 10 days after his right accrued, defendant may do so and give notice, O. XL., r. 7 (<i>ante</i> , p. 393).
extent of time allowed	No action shall be set down on motion for judgment without leave <i>after expiration of 1 year</i> from the time when party seeking to set down the same became entitled to set down action on motion, O. XL., r. 9 (<i>ante</i> , p. 393).
entry of	Entry of judgment when given in Court shall be dated as of <i>day on which judgment is pronounced</i> , O. XLI., r. 2 (<i>ante</i> , p. 396).
	Otherwise entry as of day on which requisite documents are left with officer, O. XLI., r. 3 (<i>ante</i> , p. 396).

MODE OF TRIAL.	Plaintiff may with reply give notice of mode of trial, O. XXXVI., r. 3 (<i>ante</i> , p. 363). Defendant may give notice <i>within 4 days</i> of service of such notice of trial, or within extended time that he desires to have issues of fact tried by a jury, O. XXXVI., r. 3 (<i>ante</i> , p. 363). If plaintiff do not <i>within 6 weeks</i> (unless time extended) from close of proceedings give notice of trial, defendant may do so, and thereupon plaintiff may, <i>within 4 days</i> , elect to have issues of fact tried by jury, O. XXXVI., r. 4 (<i>ante</i> , p. 365). When neither party has given notice under rules to have trial before judge and jury, or in any case under s. 57 of Act of 1873, where either party desires other mode than that named in notice of trial, he may apply for an order <i>within 4 days</i> from time of service of notice of trial, or other extended time, O. XXXVI., r. 5 (<i>ante</i> , p. 366).
NEW TRIAL, application for, where case tried in London or Middlesex	Application for new trial if case has been heard in London or Westminster must be made <i>within 4 days</i> after trial, or on <i>first subsequent day</i> of sittings, O. XXXIX., r. 1a (Dec., 1876) (<i>ante</i> , p. 387).
application for, where case tried in country	If trial heard elsewhere than in London or Middlesex, motion must be made, unless time enlarged, <i>within first 4 days</i> of next sittings following, O. XXXIX., r. 1a (<i>ante</i> , p. 387).
copy of order to show cause	Copy of order must be served on opposite party <i>within 4 days</i> from its date, O. XXXIX., r. 2 (<i>ante</i> , p. 387).
showing cause	Opposite party must show cause at expiration of <i>8 days</i> after date of order, or as soon after as case can be heard, O. XXXIX., r. 1a (<i>ante</i> , p. 387).
NOTICES, appeal from judgment	Notice of appeal from any judgment must be a <i>14 days'</i> notice, O. LVIII., r. 4 (<i>ante</i> , p. 458).
from interlocutory order	Notice of appeal from interlocutory order must be a <i>4 days'</i> notice, O. LVIII., r. 4 (<i>ante</i> , p. 458).
by a respondent in appeal from final judgment	Notice by a respondent of intention to contend that the decision of the Court should be varied must in case of appeal from final judgment (subject to any special order) be an <i>8 days'</i> notice, O. LVIII., r. 7 (<i>ante</i> , p. 462).
from interlocutory order	In an appeal as above from interlocutory order, a <i>2 days'</i> notice, O. LVIII., r. 7 (<i>ante</i> , p. 462).
of appearance	A defendant who appears elsewhere than where writ is issued, must on <i>same day</i> give notice of appearance, O. XII., r. 6a (Feb., 1876) (<i>ante</i> , p. 197).
for cross - examination when evidence taken on affidavit	When evidence is taken by affidavit, notice for cross-examination of party at trial must be served <i>within 14 days</i> after time for filing affidavits in reply or within such time as appointed, O. XXXVIII., r. 4 (<i>ante</i> , p. 385).

NOTICES—*continued.*

- of limitation of defence . . . In an action for recovery of land, a person appearing may limit his defence to part only by serving notice to that effect, *within 4 days* after appearance, O. XII., r. 21 (*ante*, p. 201).
- demurrer, entry for, argument of If demurrer be not entered for argument and notice given thereof *within 10 days* after delivery, and no order for leave to amend be served, the demurrer is held good, O. XXVIII., r. 6 (*ante*, p. 293).
- of application for guardian . . . Notice of application for a guardian *ad litem*, to be appointed to defendant who has not appeared, must be served *6 clear days* before day named in notice for hearing application, O. XIII., r. 1 (*ante*, p. 206).
- for inspection of documents . . . Inspection of documents, referred to in pleadings or affidavits, can be applied for by notice *at any time before or at the trial*, O. XXXI., r. 14 (*ante*, p. 347).
- Party receiving such notice shall, *within 2 days*, if all documents referred to therein have been set out in the pleadings or affidavits, or if not, *within 4 days*, give notice that the documents can be inspected by opposite party, O. XXXI., r. 16 (*ante*, p. 347).
- of motion for judgment where leave reserved . . . Where leave to move has been reserved, notice of motion for judgment must be given (unless otherwise ordered) *within 10 days* after trial, O. XL., r. 2 (*ante*, p. 390).
- where no direction Where no direction for entry of judgment, plaintiff must give notice of motion *within 10 days* after trial for judgment, otherwise defendant may do so, O. XL., r. 3 (*ante*, p. 391).
- where issue of fact ordered to be tried Where issues of fact have been ordered to be determined, plaintiff may give notice of motion for judgment as soon as issues determined, if he fail to do so for *10 days* after his right has accrued, defendant may give notice, O. XL., r. 7 (*ante*, p. 393).
- of motion Notice of motion must be served (except by special leave) *2 clear days* before day named therein for the hearing, O. LIII., r. 4 (*ante*, p. 444).
- of payment into Court . . . Where action for debt or damages, and defendant has paid into Court, notice of such payment must be thereupon served on the plaintiff, O. XXX., r. 2 (*ante*, p. 303).
- of acceptance of payment . . . Notice of acceptance must be given, and the plaintiff may then tax his costs (if sum accepted in satisfaction of whole claim), and in case of non-payment *within 48 hours*, may sign judgment for costs so taxed, O. XXX., r. 4 (*ante*, p. 304).
- of trial Plaintiff with reply may give notice of trial, and specify the mode of trial, O. XXXVI., r. 3 (*ante*, p. 363).
- If plaintiff do not, *within 6 weeks* (unless time extended) from close of pleadings, give notice of trial, defendant may do so, O. XXXVI., r. 4 (*ante*, p. 365).

NOTICES—*continued.*

- mode of trial And thereupon plaintiff, *within 4 days*, may give notice that he desires to have issues of fact tried by jury, O. XXXVI., r. 4 (*ante*, p. 365).
- Defendant may give notice *within 4 days* of service of notice of trial by plaintiff (or within extended time), that he desires to have issues of fact tried by a jury, O. XXXVI., r. 3 (*ante*, p. 363).
- time of Notice of trial must be (unless short notice consented to or otherwise ordered) a **10 days'** notice, O. XXXVI., r. 9 (*ante*, p. 370).
- Short notice of trial is a **4 days'** notice, O. XXXVI., r. 9 (*ante*, p. 370).
- where person gives notice of trial, but omits to enter Where a party giving notice of trial for London or Middlesex omits to enter action for trial, he who receives the notice of trial may, in the absence of countermand, *within 4 days* enter the action for trial, O. XXXVI., r. 14 (*ante*, p. 372).
- PARTIES, application to strike out or substitute Application to strike out or substitute party may be made *at any time before trial* by motion or summons before or at the trial in a summary manner, O. XVI., r. 14 (*ante*, p. 243).
- application to discharge or vary order adding a party Where an order is made under O. L., r. 4, application to discharge or vary same must be made *within 12 days* from service thereof, O. L., r. 6 (*ante*, p. 340).
- where person under disability Any one being under a disability and not represented, may apply to discharge or vary order *within 12 days* after appointment of guardian *ad litem*, O. L., r. 7 (*ante*, p. 430).
- PAYMENT into Court Where action is for debt or damages, defendant may pay into Court, *any time* after service of writ, and before or at the time of delivering his defence, or afterwards by leave, O. XXX., r. 1 (*ante*, p. 302).
- notice of payment Notice of such payment must be thereupon served on plaintiff, O. XXX., r. 2 (*ante*, p. 303).
- payment accepted Plaintiff may, *within 4 days* after notice, or if payment be first stated in defence, before reply, accept payment in satisfaction, O. XXX., r. 4 (*ante*, p. 304).
- notice of acceptance Notice of acceptance must be given, and plaintiff may then tax his costs if sum accepted in satisfaction of whole claim, and in case of non-payment *within 48 hours*, may sign judgment for costs so taxed, O. XXX., r. 4 (*ante*, p. 304).
- REMOVAL from District Registry Defendant may remove action from district registry as of right, *after 4 days* from appearance, where writ is specially indorsed, and plaintiff does not, within proper time, give notice of application for order under O. XIV., r. 1, against defendant, O. XXXV., r. 11 (*ante*, p. 359).

REMOVAL from District Registry—*continued*.

when writ specially indorsed
and defendant obtained
leave to defend

In like case, where plaintiff has applied and defendant has obtained leave under O. XIV. to defend, defendant may remove action, as of right, *at any time* after the order giving leave to defend, and before delivering, or expiration of time for delivering defence, O. XXXV., r. 11 (*ante*, p. 359).

where writ not specially indorsed

Where no special indorsement, defendant may remove action *at any time* after appearance, and before delivering, and before expiration of time for delivering defence, O. XXXV., r. 11 (*ante*, p. 359).

REPLY, and subsequent pleadings

A reply must be delivered *within 3 weeks* from the defence, O. XXIV., r. 1 (*ante*, p. 281).

further reply arising pending action

Further reply arising pending action *within 8 days* after its arising, O. XX., r. 2 (*ante*, p. 271).

subsequent pleadings

Subsequent pleadings must be delivered within the time ordered by the Court or a Judge, O. XXIV., r. 2 (*ante*, p. 282).

Subject to r. 2, they must be delivered *within 4 days*, after delivery of previous pleading unless extended, O. XXIV., r. 3 (*ante*, p. 282).

STATEMENT OF CLAIM

Statement of claim may be delivered any time *within 6 weeks* from appearance, unless otherwise ordered by Court or Judge, O. XXI., r. 1 (*ante*, p. 272).

in probate actions

In probate actions it must, unless otherwise ordered, be delivered *before expiration of 6 weeks* from entry of appearance, or from time limited for appearance, if default has been made, O. XXI., r. 2 (*ante*, p. 273).

Where defendant has appeared, plaintiff is not compelled to deliver it *until the expiration of 8 days* after the defendant has filed his affidavit as to scripts, O. XXI., r. 2 (*ante*, p. 273).

in Admiralty actions *in rem*

In Admiralty actions *in rem*, the statement of claim must be delivered *within 12 days* from the appearance, O. XXI., r. 3 (*ante*, p. 273).

amendment

Statement of claim may be amended without leave once *before time limited for reply*, or where no defence delivered *within 4 weeks* from last appearance, O. XXVII., r. 2 (*ante*, p. 286).

copy of amendment to new defendant

A copy of amended statement of claim must be delivered to a new defendant *at the time when he is served* with writ of summons or notice, or afterwards, *within 4 days* after his appearance, O. XVI., r. 16 (*ante*, p. 244).

TIME, generally

Months, unless expressed to be lunar, mean calendar, O. LVII., r. 1 (*ante*, p. 451).

Sunday, Christmas, and Good Friday, are excluded in periods of less than *6 days*, O. LVII., r. 2 (*ante*, p. 451).

Where time expires on a holiday it is extended to a day on which office is next opened, O. LVII., r. 3 (*ante*, p. 452).

TIME, generally—*continued*.

- Long Vacation is not reckoned, unless by order, in time allowed for filing, amending, and delivering pleadings, O. LVII., r. 5 (*ante*, p. 452).
- TRIAL, notice of Plaintiff may with reply give notice of trial and of the mode he desires, O. XXXVI., r. 3 (*ante*, p. 363).
 If plaintiff do not *within 6 weeks* (unless time extended) from close of proceedings give notice of trial, defendant may do so, O. XXXVI., r. 4 (*ante*, p. 365).
 And thereupon plaintiff may, *within 4 days*, elect to have issues of fact tried by a jury, O. XXXVI., r. 4 (*ante*, p. 365).
 Defendant may, *within 4 days* of service of notice of trial by plaintiff, elect to have issues tried by a jury, O. XXXVI., r. 3 (*ante*, p. 363).
 Where neither party has given notice under rules to have trial before Judge and jury, or in any case under s. 57 of Act of 1873, and where either party desires other mode than that named in the notice of trial, he may apply for an order *within 4 days* from time of service of notice of trial, O. XXXVI., r. 5 (*ante*, p. 366).
 Notice of trial (unless short notice consented to or otherwise ordered), must be a *10 days'* notice, O. XXXVI., r. 9 (*ante*, p. 370).
 Short notice of trial is a *4 days'* notice, O. XXXVI., r. 9 (*ante*, p. 370).
- TRANSFER OF ACTION Order may be made at any stage of the proceedings, O. LI., r. 2 (*ante*, p. 432).
- WARRANT OF ARREST In Admiralty actions *in rem* the warrant of arrest shall be served and filed in the registry *within 6 days* from the service thereof, O. IX., r. 9 (Dec., 1875) (*ante*, p. 190).
- WRIT of summons Original writ only in force for *12 months* from the date thereof, O. VIII., r. 1 (*ante*, p. 180).
 concurrent Concurrent writs may be issued *within 12 months* from issue of original, O. VI., r. 1 (*ante*, p. 178).
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 of execution Where money or costs payable under judgment, party generally entitled to issue writ of *fiery facias* or *elegit* immediately after entry, O. XLII., r. 15 (*ante*, p. 401).
 payment within certain period If judgment be for payment within period, no writ until period expired, O. XLII., r. 15 (*ante*, p. 401).
 Leave may be given to issue execution before or stay execution until, *any time* after period mentioned, O. XLII., r. 15 (*ante*, p. 401).
 duration of writ If unexecuted, writs to remain in force for *1 year* from issue unless renewed, O. XLII., r. 16 (*ante*, p. 401).

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"We can make no charge of redundancy or omission against our author; but if we were called upon to select any one out of the fifteen parts into which the two volumes are divided as being especially valuable, we should not hesitate to choose

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REVIEWS OF THE WORK—*continued.*

that numbered three, and entitled 'The Voyage.' There the master will find a succinct and compendious statement of the law respecting his duties, general and particular, with regard to the ship and its freight from the moment when, on taking command, he is bound to look to the seaworthiness of the ship, and to the delivery of her log at the final port of destination. In Part IV. his duties are considered with respect to the cargo, this being a distinct side of his duplicate character, inasmuch as he is agent of the owner of the cargo just as much as the owner of the ship.

"Next in order of position come 'Bills of Lading' and 'Stoppage in Transitu.' We confess that on first perusal we were somewhat surprised to find the subject of the delivery of goods by the master given priority over that of bills of lading; the logical sequence, however, of these matters was evidently sacrificed, and we think with advantage to the author's desire for unity in his above-mentioned chapters on 'The Voyage.' That this is so is evidenced by the fact that after his seventh chapter on the latter subject he has left a blank chapter with the heading of the former and a reference *ante*. 'The power of the master to bind the owner by his personal contracts,' 'Hypothecation,' and 'The Crew,' form the remainder of the contents of the first volume, of which we should be glad to have made more mention, but it is obviously impossible to criticize in detail a work in which the bare list of cited cases occupies forty-four pages.

"The question of compulsory pilotage is full of difficulties, which are well summed up by Mr. Kay in his note to page 763:—"In the United States no ship is bound to take on board a pilot either going in or coming out of the harbour, but if a pilot offers and is ready, the ship must pay pilotage fees whether he is taken on board or not." Ships do not exist for pilots, but pilots for ships, so that this option in the use of the pilot, and obligation in the matter of fees, appears to us to be exactly that solution of the difficulty which should not have been arrived at; and, moreover, it is open to the first objection urged by Mr. Kay against the compulsory system of pilotage, which is, that it obliges many ships which do not require pilots to pay for keeping up a staff for those who do. Seven other cogent reasons, for which we must refer the reader to the book itself, though most of them, indeed, will instantly present themselves to the minds of sailors without even an effort of memory, are noted. Section 338 of the Merchant Shipping Act provides that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of a pilot is compulsory by law. If he interferes to correct the pilot in the handling of a ship, with the peculiarities of which the latter cannot generally be acquainted, he may render himself and the owners liable in case of accident, and so a premium is offered to his indifference, proof being always required that the damage was occasioned solely by the pilot's neglect or fault, to entitle the owners to the benefit of this section. The decision in the case

of the *General de Caen* well illustrates some of the difficulties surrounding the subject. She was a French ship upon the Thames, where the employment of a pilot is compulsory, and she, therefore, took on board a pilot as well as a waterman to take the wheel in consequence of none of the crew being able to understand English. The waterman put her helm up instead of luffing as the pilot ordered, whereby a barge was run into and damaged. The French owner claimed under Section 389 of 17 and 18 Vic., c. 104. It was held that the pilot was not answerable for the waterman's incapacity or fault; that the pilot gave the proper orders; that it would be contrary to justice to say that the pilot was solely liable for the collision; that the waterman was the servant of the owners, and that they, therefore, were liable. The real question at issue seems to have been whether the English pilot ought to have spoken French or the French ship to have had on board a helmsman who could understand English, and the corollary, when the decision had been given in favour of the former, that the Government officer, when engaging the helmsman, was acting merely as the agent of the French owners.

"The master has a large authority over the passengers on board his ship, equal in cases of great emergency to that which he possesses over the crew. Lord Ellenborough has decided—it will comfort intending travellers by sea to hear, especially if this country should again become involved in a war with a nation which, unlike Ashanti and Abyssinia, possesses a navy—that a master exceeded the limits of his authority in placing a passenger who refused to fight on the poop, though willing to do so elsewhere, in irons all night on that particular part of the ship to which he had objected.

"It is for the interest and security of commerce and navigation that it should be generally known that the amount of service rendered is not the only or proper test by which the amount of salvage reward is estimated, but the Court will grant to successful salvage an amount which much exceeds a mere remuneration for work and labour in order that the salvors should be encouraged to run the risk of such enterprises and go promptly to the succour of lives or vessels in distress, though they must take care that they do not by their subsequent conduct forfeit their claims to such reward.

"That it should be necessary to entice men by money to save the lives of their fellow-creatures is not a matter for congratulation; still it was no doubt to some extent anomalous that formerly, whilst large proportionate sums were paid for the recovery of property, for the rescuing of human life unless associated with property, no salvage reward could be recovered. But by Section 458 of the Merchant Shipping Act the preservation of human life is made a distinct ground of salvage reward, with priority over all other claims for salvage where the property is insufficient, and if the value of the property is not adequate to the payment of the claim for life-salvage alone, the Board of Trade is empowered to award to the salvors such sum as it deems fit, either in part or whole satisfaction.

"There is, perhaps, no species of service liable to

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REVIEWS OF THE WORK—*continued.*

a greater variety of circumstances under which it can be performed than salvage. Consequently we cannot be surprised that questions of this kind frequently come before the Courts, and that the number of decided cases is very large; but Mr. Kay has succeeded in an admirable way in extracting the main points connected with each case, and in presenting them in as few words as possible. Of course fuller information may sometimes be required, but the reader will then know where to find it.

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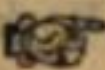
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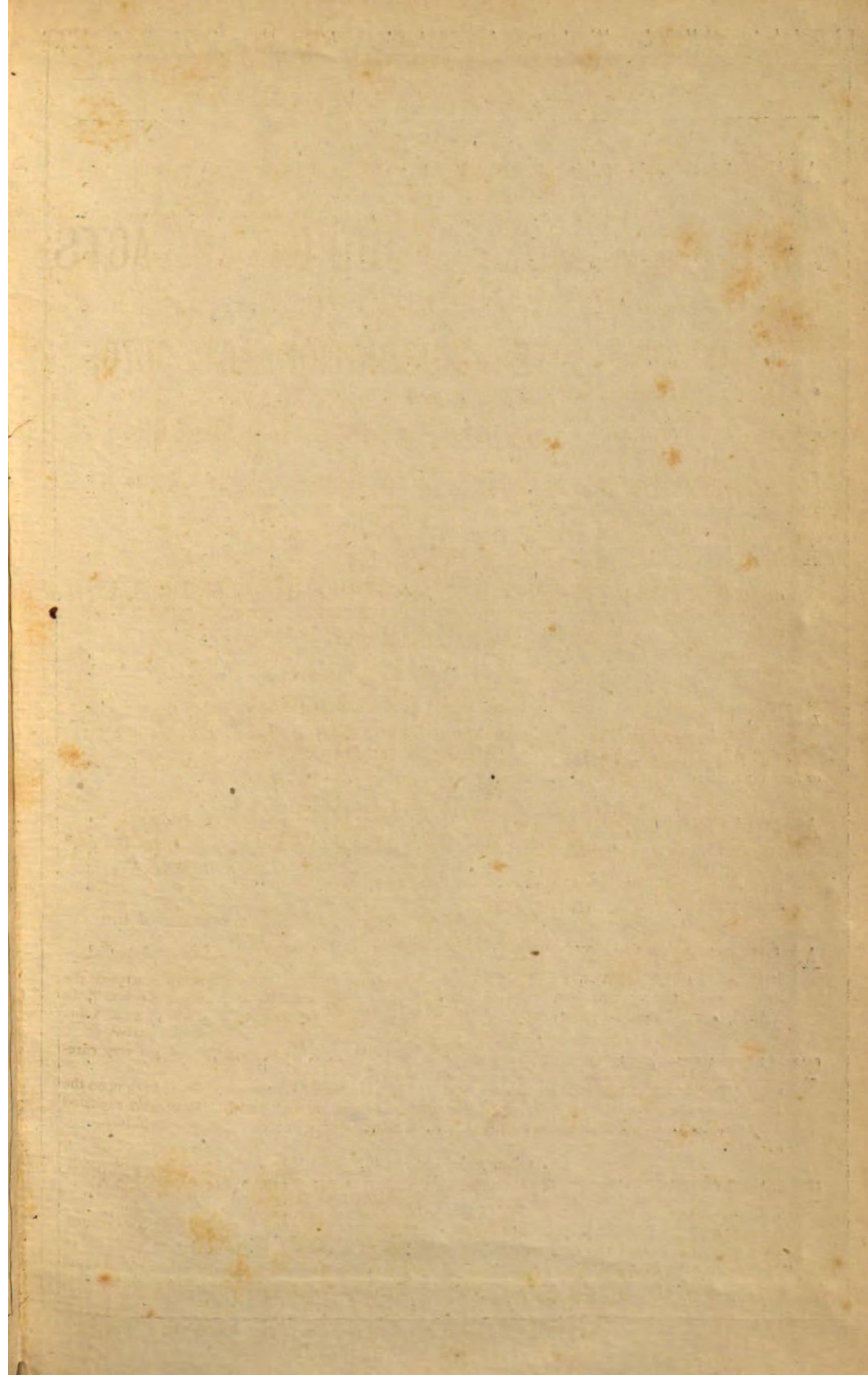
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